(8)

No. 93-1783-CFX
Status: GRANTED

Docketed:
May 9, 1994

Title: Director, Office of Workers' Compensation Programs, Department of Labor, Petitioner
v.
Newport News Shipbuilding and Dry Dock Company, et al.

Court: United States Court of Appeals for the Fourth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Postol,Lawrence P., Klein,John H.

3-28-94 ext til 5-7-94, C.J., CITED. 5-7-94, Sat., 5-8-94, Sund. Ptn rcd 5-9-94.

Entry	Date	Note	Proceedings and Orders
1	Mar 25 1994	G	Application (A93-801) to extend the time to file a petition for a writ of certiorari from April 7, 1994 to May 9, 1994, submitted to The Chief Justice.
2	Mar 28 1994		Application (A93-801) granted by the Chief Justice extending the time to file until May 7, 1994.
3	May 9 1994	G	Petition for writ of certiorari filed.
4	May 24 1994		Waiver of right of respondents Newport News Shipbuilding and Dry Dock Company, et al. to respond filed.
5	May 25 1994		DISTRIBUTED. June 10, 1994 (Page 5)
6	Jun 6 1994	P	Response requested -- RBG. (Due July 6, 1994)
7	Jul 1 1994		Brief of respondent Newport News Shipbuilding and Dry Dock Company, et al. in opposition filed.
8	Jul 6 1994		REDISTRIBUTED. September 26, 1994 (Page 34)
9	Jul 26 1994	X	Reply brief of petitioner Director, OWCP, Department of Labor filed.
10	Sep 26 1994		Petition GRANTED. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 8, 1994. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 6, 1994. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 20, 1994. Rule 29.2 does not apply.
			**********
11	Oct 7 1994	G	Motion of the Solicitor General to dispense with printing the joint appendix filed.
12	Nov 8 1994		Brief of petitioner Director, OWCP, Department of Labor filed.
13	Nov 14 1994		Motion of the Solicitor General to dispense with printing the joint appendix GRANTED.
14	Nov 14 1994		SET FOR ARGUMENT MONDAY, JANUARY 9, 1995. (1ST CASE).
16	Nov 17 1994		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Fourth Circuit.
15	Nov 18 1994		CIRCULATED.
17	Dec 5 1994	X	Brief of respondents Newport News Shipbuilding and Dry Dock

2pp

No. 93-1783-CFX

Entry	Date	Note	Proceedings and Orders
			Company, et al. filed.
18	Dec 5 1994	G	Motion of National Association of Waterfront Employers, et al. for leave to file a brief as amici curiae filed.
19	Dec 20 1994	X	Reply brief of petitioner Director, OWCP, Department of Labor filed.
20	Jan 9 1995		Motion of National Association of Waterfront Employers, et al. for leave to file a brief as amici curiae GRANTED.
21	Jan 9 1995		ARGUED.

Supreme Court, U.S.
FILED
(1) 93 1783 MAY 9 19
OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

OCTOBER TERM, 1993

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DREW S. DAYS, III
Solicitor General

THOMAS S. WILLIAMSON, JR.
Solicitor of Labor

EDWIN S. KNEEDLER
Deputy Solicitor General

ALLEN H. FELDMAN
Associate Solicitor

BETH S. BRINKMANN
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

STEVEN J. MANDEL
Deputy Associate Solicitor

MARK S. FLYNN
Senior Appellate Attorney
Department of Labor
Washington, D.C. 20210

102pp

QUESTION PRESENTED

Whether the standing of the Director of the Office of Workers' Compensation Programs in the United States Department of Labor, to petition the court of appeals for review of a decision of the Benefits Review Board under Section 21(c) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 921(c), is limited to issues that affect the Director's pecuniary interest or disrupt a specific administrative function.

PARTIES TO THE PROCEEDINGS

Jackie Harcum was the claimant in the proceeding below where the employer, Newport News Shipbuilding and Dry Dock Company, was the respondent and the Director of the Office of Workers' Compensation Programs in the United States Department of Labor was the petitioner.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statutory and regulatory provisions involved	2
Statement	2
Reasons for granting the petition	10
Conclusion	25
Appendix A	1a
Appendix B	25a
Appendix C	27a
Appendix D	37a
Appendix E	63a

TABLE OF AUTHORITIES

Cases:

Alfred L. Snapp & Son, Inc. v. *Puerto Rico*, 458 U.S. 592 (1982)	21
American Ship Bldg. Co. v. *Director, OWCP*, 865 F.2d 727 (6th Cir. 1989)	24
Baker v. *Carr*, 369 U.S. 186 (1962)	20
Bell v. *New Jersey*, 461 U.S. 773 (1983)	19
Boudreaux v. *American Workover, Inc.*, 680 F.2d 1034 (5th Cir. 1982), cert. denied, 459 U.S. 1170 (1983)	24
Coleman v. *Miller*, 307 U.S. 433 (1939)	
Curtis v. *Schlumberger Offshore Serv., Inc.*, 849 F.2d 805 (3d Cir. 1988)	11, 12
Debs, In re, 158 U.S. 564 (1895)	21
Director, OWCP v. *Alabama By-Products Corp.*, 560 F.2d 710 (5th Cir. 1977)	19-20

Cases – Continued: Page

Director, OWCP v. *Bethlehem Steel Corp.* 949 F.2d 185 (5th Cir. 1991) 13, 24
Director, OWCP v. *Donzi Marine, Inc.*, 586 F.2d 377 (5th Cir. 1978) 8, 9, 10, 20, 24
Director, OWCP v. *Eastern Coal Corp.*, 561 F.2d 632 (6th Cir. 1977) 16, 17, 20, 22
Director, OWCP v. *General Dynamics Corp.*, 982 F.2d 790 (2d Cir. 1992) 24
Director, OWCP v. *National Mines Corp.*, 554 F.2d 1267 (4th Cir. 1977) 19
Director, OWCP v. *National Van Lines, Inc.*, 613 F.2d 972 (D.C. Cir. 1979), cert. denied, 448 U.S. 907 (1980) 10
Director, OWCP v. *Newport News Shipbuilding & Dry Dock Co.*, 676 F.2d 110 (4th Cir. 1982) 9
Director, OWCP v. *O'Keefe*, 545 F.2d 337 (3d Cir. 1976) 13
Director, OWCP v. *Peabody Coal Co.*, 554 F.2d 310 (7th Cir. 1977) 20
Director, OWCP v. *Perini N. River Assocs.*, 459 U.S. 297 (1983) 10, 14
Director, OWCP v. *Rochester & Pittsburgh Coal Co.*, 678 F.2d 17 (3d Cir. 1982) 13
Donovan v. *University of Texas at El Paso*, 643 F.2d 1201 (5th Cir. 1981) 22
Flast v. *Cohen*, 392 U.S. 83 (1968) 15
Fusco v. *Perini N. River Assocs.*, 601 F.2d 659 (2d Cir. 1979), vacated and remanded, 444 U.S. 1028, reinstated on remand, 622 F.2d 1111 (2d Cir. 1980), cert. denied, 449 U.S. 1131 (1981) 10
General Tel. Co. v. *EEOC*, 446 U.S. 318 (1980) ... 22
Gladstone, Realtors v. *Village of Bellwood*, 441 U.S. 91 (1979) 23
Goldsmith v. *Director, OWCP*, 838 F.2d 1079 (9th Cir. 1988) 11
Heckman v. *United States*, 224 U.S. 413 (1912) ... 22

Cases – Continued: Page

Henderson v. *Glens Falls Indem. Co.*, 134 F.2d 320 (5th Cir.), cert. denied, 319 U.S. 756 (1943) 17
I.T.O. Corp. v. *Benefits Review Bd.*, 563 F.2d 646 (4th Cir. 1977), reinstating in pertinent part, 542 F.2d 903 (4th Cir. 1976), vacated and remanded, 433 U.S. 904 (1977) 9, 11
Ingalls Shipbuilding Div., Etc. v. *White*, 681 F.2d 275 (5th Cir. 1982), overruled in part on other grounds, *Newpark Shipbuilding & Repair, Inc.* v. *Roundtree*, 723 F.2d 399 (5th Cir.), cert. denied, 469 U.S. 818 (1984) 11
Kalaris v. *Donovan*, 697 F.2d 376 (D.C. Cir.), cert. denied, 462 U.S. 1119 (1983) 4, 5, 12
Krolick Contracting Corp. v. *Benefits Review Bd.*, 558 F.2d 685 (3d Cir. 1977) 19
Lujan v. *Defenders of Wildlife*, 112 S. Ct. 2130 (1992) 15, 23
Moe v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976) 22
Mullins Coal Co. v. *Director, OWCP*, 484 U.S. 135 (1987) 24
Newport News Shipbuilding & Dry Dock Co. v. *Howard*, 904 F.2d 206 (4th Cir. 1990) 24
Northeast Marine Terminal Co. v. *Caputo*, 432 U.S. 249 (1977) 21
Potomac Elec. Power Co. v. *Director, OWCP*, 449 U.S. 268 (1980) 24
Sea-Land Service, Inc. v. *Rock*, 953 F.2d 56 (3d Cir. 1992) 24
Secretary of Labor v. *Fitzsimmons*, 805 F.2d 682 (7th Cir. 1986) 22
Shahady v. *Atlas Tile & Marble Co.*, 673 F.2d 479 (D.C. Cir. 1982) 11, 15, 17, 22
Sierra Club v. *Morton*, 405 U.S. 727 (1972) 15
Stevens v. *Director, OWCP*, 909 F.2d 1256 (9th Cir. 1990), cert. denied, 498 U.S. 1073 (1991) ... 6

Cases – Continued: Page

Stevens v. *Lockheed Shipbuilding Co.*, 22 Ben. Rev. Bd. Serv. (MB) 155 (1989), rev'd, 909 F.2d 1256 (9th Cir. 1990), cert. denied, 498 U.S. 1073 (1991) 6
Thornton v. *Brown & Root, Inc.*, 707 F.2d 149 (5th Cir. 1983), cert. denied, 464 U.S. 1052 (1984) 11
Tiger v. *Western Investment Co.*, 221 U.S. 286 (1911) 19
Trafficante v. *Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972) 20, 23
United States v. *Federal Maritime Comm'n*, 655 F.2d 247 (D.C. Cir. 1980) 22
United States v. *Federal Maritime Comm'n*, 694 F.2d 793 (D.C. Cir. 1982) 22
United States ex rel. Chapman v. *Federal Power Comm'n*, 345 U.S. 153 (1953) 21
Valley Forge Christian College v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982) 23
Voris v. *Eikel*, 346 U.S. 328 (1953) 21
West Virginia Univ. Hospitals, Inc. v. *Casey*, 499 U.S. 83 (1991) 19
Zapata Haynie Corp. v. *Barnard*, 933 F.2d 256 (4th Cir. 1991) 24

Constitution, statutes, regulations and rules:

U.S. Const. Art. III 10, 14, 15, 20, 23
Black Lung Benefits Act, 30 U.S.C. 932(a) 18
Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 18
§ 7(h), 92 Stat. 99 (30 U.S.C. 932(k)) 18, 19
Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. 901 *et seq.* 2
33 U.S.C. 907 ..... 2, 16
33 U.S.C. 908(f) (§ 8(f)) 5

Statutes, regulations and rules – Continued: Page

33 U.S.C. 908(i) 2, 16
33 U.S.C. 913(a) 3
33 U.S.C. 919(c) 3
33 U.S.C. 919(d) 3
33 U.S.C. 919(e) 3
33 U.S.C. 921(b) 2, 63a
33 U.S.C. 921(b)(1) 4
33 U.S.C. 921(b)(3) 4, 6
33 U.S.C. 921(c) (§ 21(c)) ..... *passim*
33 U.S.C. 921(d) 2, 3, 65a
33 U.S.C. 921a 2, 3, 16, 65a
33 U.S.C. 928(a) 23
33 U.S.C. 939(a) 2, 3, 15, 65a
33 U.S.C. 939(b) 3
33 U.S.C. 939(c) 2, 3, 16, 66a
33 U.S.C. 941 ..... 3, 16
33 U.S.C. 944 ..... 3, 16
33 U.S.C. 944(a) 5
Longshoremen's and Harbor Workers' Compensation Act, ch. 509, § 21(b), 44 Stat. 1436 (1927) (33 U.S.C. 921(b) (1970)) 17
Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, 86 Stat. 1251 4
28 U.S.C. 1254(1) 14
28 U.S.C. 1291 ..... 4, 17
20 C.F.R.:
Section 701.201 ..... 2, 3, 67a
Sections 701.201-701.203 3
Section 701.202 ..... 2, 3, 67a
Section 701.202(a) 19
Section 701.202(f) 19
Section 701.301(a)(7) 3
Sections 702.301-702.317 3
Section 702.333 ..... 2, 67a

Regulations and rules – Continued:	Page
Section 702.333(a)	3
Section 702.333(b)	4, 15
Sections 702.348-702.349	3
Section 801.2(a)(10)	4, 15
Section 801.102	2, 4, 68a
Section 802.201(a)(1)	4, 15
Section 802.410	2, 5, 68a
Section 802.410(b)	4, 15, 68a
Fed. R. App. P. 15(a)	11, 12
Fed. R. Civ. P. 24	11
Miscellaneous:	
E. Chemerinsky, *Federal Jurisdiction* (1989)	8
42 Fed. Reg. 16,133 (1977)	5
55 Fed. Reg. 9033 (1990)	3
H.R. Rep. No. 1441, 92d Cong., 2d Sess. (1972)	16, 18, 21
A. Larson, *The Law of Workmen's Compensation* (1993):	
Vol. 1	21
Vol. 3	21
S. Rep. No. 1125, 92d Cong., 2d Sess. (1972)	18, 21-22
S. Rep. No. 209, 95th Cong., 1st Sess. (1977)	19

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OCTOBER TERM, 1993

No.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the Director of the Office of Workers' Compensation Programs in the Department of Labor, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-24a) is reported at 8 F.3d 175. The decision of the Benefits Review Board (App., *infra*, 27a-36a) is unreported. The decision of the administrative law judge (App., *infra*, 37a-62a) is reported at 23 Ben. Rev. Bd. Serv. 515.

JURISDICTION

The court of appeals entered its judgment on October 29, 1993, and denied a petition for rehearing on January 7, 1994. App., *infra*, 25a-26a. On March 28, 1994, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 7, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent provisions of the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 921(b), 921(c), 921(d), 921a, 939(a), 939(c)) are reprinted at App., *infra*, 63a-66a. Pertinent provisions of the Department of Labor's regulations (20 C.F.R. 701.201, 701.202, 702.333, 801.102, 802.410) are reprinted at App., *infra*, 67a-68a.

STATEMENT

This case concerns the standing of the Director of the Office of Workers' Compensation Programs in the Department of Labor to petition the court of appeals to review a decision of the Benefits Review Board under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*

1. The LHWCA creates a comprehensive federal scheme to compensate workers injured or killed while employed upon the navigable waters of the United States. Congress directed the Secretary of Labor to "administer the provisions" of the Act and authorized him to issue "rules and regulations" necessary to the Act's administration. 33 U.S.C. 939(a). Congress also specifically provided that the Secretary shall actively supervise the medical care rendered to injured employees, 33 U.S.C. 907; approve

settlements, 33 U.S.C. 908(i); appear before courts of appeals through attorneys appointed to represent him, 33 U.S.C. 921a; bring actions in district court to enforce compensation awards, 33 U.S.C. 921(d); furnish information to claimants, assist them in obtaining medical and rehabilitation services, and, upon request, provide legal assistance in processing a claim, 33 U.S.C. 939(c); administer a Special Fund for payment of benefits in specified circumstances, 33 U.S.C. 944; and issue and enforce rules and regulations pertaining to employee safety, 33 U.S.C. 941. The Secretary has delegated most of his responsibilities under the LHWCA to the Director of the Office of Workers' Compensation Programs (Director). 20 C.F.R. 701.201, 701.202; see 55 Fed. Reg. 9033 (1990) (Secretary of Labor's delegation of some safety and health responsibilities to Assistant Secretary for Occupational Safety and Health).

Workers seeking compensation under the Act must file a claim with one of the local district directors (referred to in the LHWCA as "deputy commissioners") in the Office of Workers' Compensation Programs (OWCP), who carry out the day-to-day administration of the Act. 33 U.S.C. 913(a), 939(a) and (b); 20 C.F.R. 701.201-701.203, 701.301(a)(7). The district director conducts such investigation of the claim as he deems necessary and, if able to resolve the claim informally, is authorized to issue a compensation order; if he is unable to resolve the claim informally, it is forwarded for hearing to an administrative law judge (ALJ), who is then empowered to issue a compensation order. 33 U.S.C. 919(c), (d) and (e); 20 C.F.R. 702.301-702.317, 702.348-702.349. Implementing regulations provide that the claimant and the employer (or its insurance carrier) are necessary parties for a hearing, 20 C.F.R. 702.333(a), and that the Solicitor of Labor, or his

designee may participate on behalf of the Director, as an "interested party." 20 C.F.R. 702.333(b).

An ALJ's decision is reviewable by the Benefits Review Board (Board) whose members are appointed by the Secretary. 33 U.S.C. 921(b)(1). The Board reviews the ALJ's decision to determine if it is supported by substantial evidence and is in accordance with law. 33 U.S.C. 921(b)(3); 20 C.F.R. 801.102; see generally *Kalaris* v. *Donovan*, 697 F.2d 376, 382 (D.C. Cir.), cert. denied, 462 U.S. 1119 (1983). Any "party in interest" may file an appeal from the ALJ to the Board. 33 U.S.C. 921(b)(3). The term "party in interest" is defined by regulation to mean "the Secretary or his designee and any person or business entity directly affected by the decision or order from which an appeal to the Board is taken." 20 C.F.R. 801.2(a)(10); see also 20 C.F.R. 802.201(a)(1).

The Board's decision is reviewable by the court of appeals. Under Section 21(c) of the LHWCA, any "person adversely affected or aggrieved" may petition the court of appeals for such judicial review. 33 U.S.C. 921(c). The Secretary's regulations provide that the Director, as the designee of the Secretary "responsible for the administration and enforcement" of the Act, "shall be deemed to be the proper party on behalf of the Secretary of Labor in all review proceedings conducted pursuant to section 21(c) of the LHWCA [33 U.S.C. 921(c), i.e., in the court of appeals]." 20 C.F.R. 802.410(b).[1]

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[1] The procedures for adjudication of claims reflect substantial modifications made by the 1972 amendments to the LHWCA. See Pub. L. No. 92-576, 86 Stat. 1251. Before those amendments, OWCP deputy commissioners conducted hearings and issued compensation orders in disputed cases. Those decisions were reviewable in an injunctive action against the deputy commissioner in district court, subject to further review by appeal to the court of appeals under 28 U.S.C. 1291. See *Kalaris*, 697 F.2d at 381-382. The 1972 amendments transferred the deputy commissioners' hearing authority to ALJs and replaced the district court injunctive proceedings with appeals to the Board, whose decisions are subject to review by the court of appeals under 33 U.S.C. 921(c). Under the new regime, "[t]he Board * * * performs a review function identical to that which the [d]istrict [c]ourts performed" before the 1972 amendments. *Kalaris*, 697 F.2d at 382. As a purely adjudicatory body, the Board, like a district court, does not participate as a party in appeals from its decisions. See 42 Fed. Reg. 16,133 (1977) (notice accompanying promulgation of 20 C.F.R. 802.410 stating that "[a]s a quasi-judicial body the Board does not participate in any court proceedings challenging the validity of its decisions").

2. Jackie Harcum, an employee of Newport News Shipbuilding and Dry Dock Co. (Newport News), suffered a work-related, disabling back injury and filed a claim for benefits under the LHWCA. App., *infra*, 2a. The claim was referred to an ALJ to resolve several disputed issues, including whether claimant Harcum was entitled to benefits for temporary total disability (not merely partial disability) from the date that he stopped work at the shipyard (May 6, 1988) until the date he found alternative employment (February 16, 1989). *Id.* at 6a, 39a.[2]

[2] Newport News also asserted that the claimant suffered from a preexisting permanent partial disability that contributed to his current disability, and that Newport News was entitled to a reduction in the amount of benefits it was required to pay because the Special Fund administered by the Secretary should assume payment for part of the benefits under Section 8(f) of the Act. App., *infra*, 7a. See 33 U.S.C. 908(f) (Special Fund assumes liability for compensation payment for injury after 104 weeks of permanent disability if claimant had preexisting permanent partial disability that combined with his compensable injury to render him more disabled than he would have been from the injury alone); 33 U.S.C. 944(a). The ALJ and the Board agreed with Newport News that Section 8(f) applied to this case. App., *infra*, 7a, 33a-36a, 59a-61a. The court of appeals, however, rejected both parties' interpretations of Section 8(f), reversed the Board's ruling and remanded the case for further proceedings. App., *infra*, 14a-24a. Newport News filed a petition for rehearing and suggestion

The ALJ applied the rationale of the Board's decision in *Stevens* v. *Lockheed Shipbuilding Co.*, 22 Ben. Rev. Bd. Serv. (MB) 155 (1989) (total disability becomes partial when claimant regains residual wage-earning capacity and it relates back to date of maximum medical improvement). The ALJ reasoned that the claimant was entitled only to permanent partial (rather than temporary total) disability benefits as of May 6, 1988, because that was the date he left employment at Newport News and because the date of his maximum medical improvement had already passed. App., *infra,* 6a, 56a-57a. The ALJ held that the claimant regained residual wage-earning capacity as of May 6, 1988, and that he therefore should have received compensation after that date based only on a permanent partial disability. *Id.* at 57a.

The Director appealed the ALJ's ruling to the Board as a "party in interest," pursuant to 33 U.S.C. 921(b)(3). App., *infra,* 7a. The Director contended that the claimant was entitled to benefits based on permanent total disability until February 16, 1989, when he secured other employment. The claimant responded in support of the Director's argument and Newport News responded in support of affirmance. *Id.* at 29a.

The Board affirmed the ALJ's ruling, although it clarified the underlying rationale. The Board vacated the ALJ's reliance on its *Stevens* decision because the decision had subsequently been reversed on judicial review. App., *infra,* 29a-31a; *Stevens* v. *Director, OWCP,* 909 F.2d 1256 (9th Cir. 1990), cert. denied, 498 U.S. 1073 (1991). The Board affirmed, however, on the alternative rationale that

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of rehearing en banc on the Section 8(f) issue, which the court of appeals denied. App., *infra,* 25a-26a. Although the Director disagrees with the court's Section 8(f) ruling, she does not believe that review of that issue by this Court is warranted.

Newport News' uncontradicted evidence showed that there was suitable alternate employment for the claimant as of May 1988, and that the claimant had not shown that he was unable to obtain such employment. App., *infra,* 31a-33a. The Board also ruled that a statement by Newport News to the claimant that it would determine whether it had a light-duty position available for him, and its subsequent hiring of a vocational consultant to assist the claimant in securing alternate employment, did not affect that finding, because Newport News was not under any obligation to rehire claimant or to find him an actual job offer. *Id.* at 32a-33a. The Board therefore concluded that the claimant was only partially disabled as of May 1988.

3. The Director filed a petition in the court of appeals for review of the Board's decision pursuant to 33 U.S.C. 921(c). The claimant did not file a petition for review. In response to an inquiry from the court of appeals (following the Director's motion to amend the case caption and Newport News' statement that it did not object), the claimant stated that he had not appealed, but that the Director could pursue the case as she chose. See Attachments A and B to Respondent's Answer to Petitioner's Petition for Rehearing. The court of appeals granted the Director's motion and amended the caption to show Harcum as a claimant in the proceedings below.

The Director challenged the Board's holding as to suitable alternative employment, contending that the Board usurped the ALJ's fact-finding role. The Director also contended that, even if the employer made a showing of suitable alternative employment, the claimant had legitimately relied on the employer's vocational rehabilitation program, rather than independently seeking work, during the period in question. Thus, the Director argued that the Board's decision erroneously denied total disability bene-

fits for the period between May 1988 and February 1989. App., *infra,* 2a.

Although the issue of standing was not raised or briefed by the parties, the court of appeals held that the Director did not have standing to petition for review of the Board's ruling as to the onset date of claimant's partial disability. App., *infra,* 9a n.1, 13a-14a. The LHWCA provides in relevant part that "[a]ny person adversely affected or aggrieved by a final order of the Board may obtain a review of that order" in the court of appeals. 33 U.S.C. 921(c). The court concluded that 33 U.S.C. 921(c) "codifies the constitutional requirement that limits standing to those persons who can allege 'that they personally have suffered or imminently will suffer an injury.' " App., *infra,* 9a n.1 (quoting E. Chemerinsky, *Federal Jurisdiction* § 2.3.2, at 52 (1989)). In the court's view, the Director suffers such an injury only when a Board decision "alter[s] the Director's ability to carry out his or her responsibilities under the LHWCA or to protect the fiscal integrity of the special fund." App., *infra,* 14a.

In holding that the Director lacks standing, the court of appeals relied upon *Director, OWCP* v. *Donzi Marine, Inc.,* 586 F.2d 377 (5th Cir. 1978). App., *infra,* 10a-12a. The court explained that in *Donzi Marine,* the Fifth Circuit held that the Director "would have standing only if an interest of the Director arising from his or her specifically delegated responsibilities was adversely affected by the Board's decision." App., *infra,* 10a. The court below indicated that, under the *Donzi Marine* rationale, the Director "may redress Board decisions that adversely affect the Director's legitimate administrative interests. * * * For example, if a Board decision substantially augmented the nature of the administrative duties delegated to the Director, increased the Director's necessary expenditure of administrative resources, or created confusion as to how the

Director was to carry out specific functions, the Director's responsibilities under the LHWCA would be bound up sufficiently with the merits of the appeal to evidence a cognizable administrative injury." App., *infra,* 11a, citing *Donzi Marine,* 586 F.2d at 381-382.

The court of appeals noted that it had adopted the logic of *Donzi Marine* in *Director, OWCP* v. *Newport News Shipbuilding & Dry Dock Co. (Langley),* 676 F.2d 110 (4th Cir. 1982), where it had questioned whether "the Board's decision sufficiently implicated an administrative or economic interest of the Director so as to give rise to a redressable injury." App., *infra,* 13a. The court treated its decision in *Langley* as holding that the Director had standing because of his interest in protecting the fiscal integrity of the Special Fund. App., *infra,* 13a, citing 676 F.2d at 114.[3]

Applying the foregoing analysis to this case, the court concluded that the Director had standing to seek review of the portions of the Board's decision that would result in increased payments from the Special Fund administered by the Director (see note 2, *supra*), but did not have standing to appeal the issue of the onset date of the claimant's partial disability. The court reasoned that although the Director contended that the Board misapprehended the LHWCA's requirements, the Board's conclusion as to when claimant's disability became partial neither altered the Director's ability to carry out her responsibilities under the LHWCA nor affected the fiscal integrity of the Special Fund. App., *infra,* 13a-14a.[4]

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[3] The court below also noted its own prior holding that the Director is not a proper respondent to a petition for review under 33 U.S.C. 921(c). App., *infra,* 12a n.2 (citing *I.T.O. Corp.* v. *Benefits Review Bd.,* 563 F.2d 646, 648 (4th Cir. 1977) (en banc)), discussed at note 6, *infra.*

[4] The court denied the Director's petition for rehearing and suggestion of rehearing en banc on the standing issue. Two judges voted to rehear the case en banc. App., *infra,* 25a-26a.

REASONS FOR GRANTING THE PETITION

The court of appeals erred in holding that the Director does not have standing to petition the court of appeals for review of a ruling by the Benefits Review Board unless the Director has a pecuniary interest or the Board's ruling will disrupt the Director's performance of specific administrative functions. The court of appeals failed to recognize that the Director is "aggrieved or adversely affected" by the Board's ruling in the instant case, and thus has standing to appeal, due to the interests created by Congress in the Secretary and the Director in their broad authority to administer the LHWCA and to participate in the claims adjudication process. This Court specifically noted, but left unresolved, the issue of the Director's standing in *Director, OWCP* v. *Perini N. River Assocs.*, 459 U.S. 297, 302-305 (1983), and that issue continues to divide the courts of appeals. Review by this Court therefore is warranted.

1. Although the decision below is in accord with decisions of the Second Circuit and Fifth Circuit,[5] it conflicts with decisions of the D.C. Circuit. In *Director, OWCP* v. *National Van Lines, Inc.*, 613 F.2d 972 (1979), cert. denied, 448 U.S. 907 (1980), the D.C. Circuit held that the Director "has standing as a petitioner in this proceeding

[5] See *Fusco* v. *Perini N. River Assocs.*, 601 F.2d 659 (2d Cir. 1979), vacated and remanded on other grounds, 444 U.S. 1028, reinstated on remand, 622 F.2d 1111, 1113 (2d Cir. 1980), cert. denied, 449 U.S. 1131 (1981); *Donzi Marine, Inc.*, 586 F.2d at 382. *Fusco* and *Donzi Marine* hold that the Director lacks statutory standing under 33 U.S.C. 921(c) to appeal Board orders denying compensation claims. *Fusco*, 601 F.2d at 670, 622 F.2d at 1113; *Donzi Marine*, 586 F.2d at 382. Neither *Fusco* nor *Donzi Marine* addressed whether the Director would have standing under Article III if she was statutorily authorized to seek review. *Fusco*, 601 F.2d at 670; *Donzi Marine*, 586 F.2d at 378 n.2.

both because of his official responsibility for administration of the LHWCA and because of his financial interest as administrator of the special fund." 613 F.2d at 977 n.6. The D.C. Circuit reinforced that ruling in *Shahady* v. *Atlas Tile & Marble Co.*, 673 F.2d 479 (1982), where it explained that it had "previously held that the Director's general supervisory and enforcement interest, apart from any pecuniary interest, is sufficient to convey upon the Director standing to file a petition for review under section 921(c)." 673 F.2d at 483.[6] The Fourth Circuit in *Langley*

[6] *Shahady* specifically involved the question whether the Director is a proper respondent in proceedings before the court of appeals. The D.C. Circuit held that "[b]ecause the statutory scheme of the LHWCA and regulations promulgated thereunder clearly contemplate that the Secretary or his delegate shall participate as a matter of course in section 921(c) review proceedings, we hold the Director should be named a party-respondent in all review proceedings brought under section 921(c), whether or not the Director supports the Board's order." 673 F.2d at 480. Other courts of appeals have agreed with *Shahady* that the Director is a proper respondent under the Act. See *Goldsmith* v. *Director, OWCP*, 838 F.2d 1079, 1080 (9th Cir. 1988); *Thornton* v. *Brown & Root, Inc.*, 707 F.2d 149, 154 (5th Cir. 1983), cert. denied, 464 U.S. 1052 (1984); *Ingalls Shipbuilding Div., Etc.* v. *White*, 681 F.2d 275, 286-287 (5th Cir. 1982), overruled on other grounds by *Newpark Shipbuilding & Repair, Inc.* v. *Roundtree*, 723 F.2d 399 (5th Cir.) (en banc), cert. denied, 469 U.S. 818 (1984); see also *Curtis* v. *Schlumberger Offshore Serv., Inc.*, 849 F.2d 805, 807 n.4 (3d Cir. 1988). But see *I.T.O. Corp.* v. *Benefits Review Bd.*, 563 F.2d 646, 648 (4th Cir. 1977) (en banc), reinstating in pertinent part, 542 F.2d 903 (4th Cir. 1976) (en banc), vacated and remanded, 433 U.S. 904 (1977) (Director limited to intervention under Fed. R. Civ. P. 24). Some of the decisions upholding the Director's status as respondent are based on 33 U.S.C. 921(c) and some are based solely on Fed. R. App. P. 15(a), which provides that petitions for review of administrative agency orders must name the agency as a respondent. *Brown & Root, Inc.*, 707 F.2d at 154; *Ingalls Shipbuilding*, 681 F.2d at 282-284.

understood *National Van Lines* as holding that the Director "has standing to appeal because of his general administrative responsibility and his financial interest in the special fund." 676 F.2d at 113. And in the instant case, the Fourth Circuit specifically recognized that its ruling is inconsistent with *Shahady*. See App., *infra*, 12a.[7]

The Third Circuit has indicated its approval of *Shahady*, as "sound on policy because the Director's supervisory and enforcement interest should be sufficient to entitle him to participate as a party; his responsibility to oversee the development of a consistent body of law in this area should not depend upon the vagaries of the parties' private, albeit adversary, interests." *Curtis* v. *Schlumberger Offshore Serv., Inc.*, 849 F.2d 805, 807 n.4 (1988). The Third Circuit did not decide the issue in *Curtis* because the employer and employee were both parties before that court. In an earlier case under the Black Lung Benefits Act which incorporates the same judicial review process as under the LHWCA, however, the Third Circuit noted that the Director had standing to petition the court of appeals for review of a Board ruling even though the Director lacked a pecuniary interest in the litigation. The court explained that it concurred "in the Director's view

[7] Although *Shahady* presented the question of whether the Director may appear as *respondent* when a private party has petitioned for review of a Benefits Review Board decision, its holding that the Director is an automatic respondent in review proceedings is based not on Fed. R. App. P. 15(a), but rather on *National Van Lines*, which held that the Director has standing as a *petitioner* and which *Shahady* interpreted as holding that the Director's general interest in enforcement of the LHWCA is an independent basis for standing. 673 F.2d at 483. Thus, *Shahady* clearly establishes in the D.C. Circuit that the Director, based on her status as administrator of the Act, may appear as petitioner *or* respondent in proceedings under 33 U.S.C. 921(c). See *Kalaris* v. *Donovan*, 697 F.2d 376, 381 n.8 (D.C. Cir.), cert. denied, 462 U.S. 1119 (1983).

that he has standing because of his responsibility to ensure the proper enforcement and lawful administration of the black lung benefits program." *Director, OWCP* v. *Rochester & Pittsburgh Coal Co.*, 678 F.2d 17, 18-19 n.2 (3d Cir. 1982); see also *Director, OWCP* v. *O'Keefe*, 545 F.2d 337, 339 & n.7 (3d Cir. 1976) (assuming Director has authority under 33 U.S.C. 921(c) to petition court of appeals for review of Board decision).

Significantly, moreover, the Fifth Circuit itself appears to have retreated from the standard it set forth in *Donzi Marine*, on which the court below relied. In *Director, OWCP* v. *Bethlehem Steel Corp.*, 949 F.2d 185, 186-187 (1991), the Fifth Circuit held that the Director has statutory standing to challenge a Board ruling as to when a total disability becomes a partial disability—an issue that is, for present purposes, analytically indistinguishable from the one the Fourth Circuit held that the Director did *not* have standing to raise in this case. The Fifth Circuit reasoned that the Director was "faced by the ruling of three Courts of Appeals that the Board of Review is simply wrong," which "poses a major problem in the administration of an Act which was conceived out of the * * * constitutional demand for a nationwide uniformity." *Id.* at 187. The court pointed out that if the Director did not have standing to seek relief from the Board's ruling, "injured workers in the extensive maritime activities in the Fifth Circuit must endure a ruling fraught with substantial dollar loss." *Ibid.*[8] Thus, the Fifth Circuit standard appears to permit the court to substitute its judgment for the Director's judgment as to the impact that a Board decision has on the administration of the LHWCA, thereby leading to great unpredictability.

[8] The Fifth Circuit also noted that although the claimant had not filed his own petition for review of the Board's decision, the claimant had entered a formal appearance in the case and had adopted the Director's briefs and argument. 949 F.2d at 186.

In *Director, OWCP* v. *Perini N. River Assocs.*, 459 U.S. 297, 302-305 (1983), this Court took note of the question whether the Director has statutory and Article III standing to file a petition for a writ of certiorari. The Court found it unnecessary to decide the question, however, because the employer in *Perini* conceded that the Director was a proper respondent before the court of appeals and, as such, was entitled to petition for a writ of certiorari under 28 U.S.C. 1254(1). 459 U.S. at 304. Moreover, the claimant in *Perini* participated before this Court and filed briefs in support of the Director thereby ensuring that the Court was presented with an admittedly justiciable controversy. *Id.* at 304-305. The Court noted that in some earlier cases, the Director had petitioned for writs of certiorari that were granted by the Court, but because of the procedural posture, resolution of the standing issue had been unnecessary in those cases as well. *Id.* at 303 n.11.[9] The Court should now resolve the standing issue that it has left open and that continues to divide the lower courts.

2. a. The panel's holding that the Director does not have standing to petition the court of appeals for review of the Board's ruling on the partial disability issue is incorrect. There is an ongoing dispute in this case as to the proper amount of benefits that the claimant should be

[9] The Court also pointed out that the courts of appeals that had rejected the Director's standing argument in *Fusco, Donzi Marine*, and *I.T.O. Corp.*, had relied on statutory grounds and did not address the Article III standing issue. 459 U.S. at 302 n.9. The Court concluded in the *Perini* case that "the Director has statutory authority to seek review in this Court," but that the Director "*may* not have Art. III standing to argue the merits of [claimant's] claim because the Director's presence does not guarantee the existence of a justiciable controversy with respect to the merits of [claimant's] coverage under the LHWCA." 459 U.S. at 304.

awarded. And "where a dispute is otherwise justiciable, the question whether the litigant is a 'proper party to request an adjudication of a particular issue,' * * * is one within the power of Congress to determine." *Sierra Club* v. *Morton*, 405 U.S. 727, 732 n.3 (1972) (quoting *Flast* v. *Cohen*, 392 U.S. 83, 100 (1968)).

Congress thus may determine whether an interest is "legally-protected," see *Lujan* v. *Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992), such that an invasion of that interest results in an "injury in fact" for standing purposes. In this case, Congress has vested the Secretary of Labor with authority to promulgate regulations to aid in his administration of the LHWCA (33 U.S.C. 939(a)); those regulations grant the Director standing to participate at all levels, administrative and judicial, of a LHWCA dispute. *Shahady*, 673 F.2d at 483. The regulations specifically provide that the Director, as the designated official "responsible for the administration and enforcement" of the Act, "shall be deemed to be the proper party on behalf of the Secretary of Labor in all review proceedings" in the courts of appeals. 20 C.F.R. 802.410(b).[10]

In holding that the Director nevertheless lacks Article III standing, the court of appeals failed to recognize the extensive duties conferred on the Director (through the Secretary) by Congress and the attendant interests the Secretary and Director are entitled to advance. As noted above, Congress has vested the Secretary of Labor with the following duties: "administer[ing] the provisions" of the Act and issuing necessary "rules and regulations," 33 U.S.C. 939(a); actively supervising the medical care

[10] The regulations also make clear that the Director has standing to participate in administrative proceedings, including by appealing to the Board from an ALJ decision with which she disagrees. 20 C.F.R. 702.333(b), 801.2(a)(10), 802.201(a)(1).

rendered to injured employees, including maintaining a list of health care providers not authorized to render services under the LHWCA and regulating the medical expenses, 33 U.S.C. 907; approving settlements, 33 U.S.C. 908(i); appearing before courts of appeals through attorneys appointed to represent him, 33 U.S.C. 921a; bringing actions (through deputy commissioners) in district court to enforce compensation awards, 33 U.S.C. 921(d); furnishing information to claimants, assisting them in obtaining medical and rehabilitation services, and, upon request, providing them with legal assistance in processing a claim, 33 U.S.C. 939(c); administering a Special Fund for payment of benefits in specified circumstances, 33 U.S.C. 944; and issuing and enforcing rules and regulations pertaining to employee safety, 33 U.S.C. 941.

In sum, the Secretary is charged with ensuring that employers fulfill their statutory responsibility to pay valid claims (thereby relieving the claimant and the public at large of that cost), assisting claimants in both administrative hearings and the courts, and defending the special fund against invalid claims. Cf. *Director, OWCP* v. *Eastern Coal Corp.*, 561 F.2d 632, 641-648 (6th Cir. 1977) (discussing Secretary's analogous duties under Black Lung Benefits Act). The Secretary's role in ensuring payment by employers and assisting claimants not only serves the interest in "meeting the needs of the injured employee and his family," but also "by assuring that the employer bears the cost of unsafe conditions, serves to strengthen the employer's incentive to provide the fullest measure of on-the-job safety." H.R. Rep. No. 1441, 92d Cong., 2d Sess. 1 (1972). This statutory assignment of authority to the Secretary and, by delegation, to the Director, gives the Director standing to petition for review of Board decisions that she believes are erroneous.

b. The history of the LHWCA strongly supports the conclusion that the Director is "adversely affected or aggrieved" by Board orders that incorrectly reject a claim for benefits under the Act. Prior to the 1972 Amendments to the Act (see note 1, *supra*), the deputy commissioners (field administrators under the authority of the Director's predecessor) conducted hearings on claims, and their decisions were subject to review in injunctive proceedings in district court. The deputy commissioner was denominated as a respondent in such district court proceedings, see former Section 21(b), 44 Stat. 1436 (1927) (codified at 33 U.S.C. 921(b) (1970)), and it was clear that the deputy commissioner had standing to appeal under 28 U.S.C. 1291 from a district court ruling enjoining his decision, even in the absence of an appeal by another party. See *Henderson* v. *Glens Falls Indem. Co.*, 134 F.2d 320 (5th Cir.), cert. denied, 319 U.S. 756 (1943).

The 1972 Amendments transferred the authority to conduct hearings to ALJs and replaced district court injunctive actions with review by the Board, subject to review in the court of appeals. There is no indication, however, that those changes were intended to divest the LHWCA's administrator of authority to seek review in the courts of appeals of decisions on benefits claims that are adverse to her position. Cf. *Director, OWCP* v. *Eastern Coal Corp.*, 561 F.2d 632, 649 (6th Cir. 1977) ("[w]e do not find in the [1972 Amendments] any Congressional intention * * * to compel the Secretary or his duly designated representative to accept [Board decisions] without recourse to the courts when he conscientiously disagrees"); *Shahady*, 673 F.2d at 485. Indeed, such a restrictive interpretation of 33 U.S.C. 921(c) would thwart the Director's policymaking, administrative and protective roles under the LHWCA, and would be directly at odds with a major purpose of the 1972

Amendments, which was to augment these roles. See S. Rep. No. 1125, 92d Cong., 2d Sess. 13-14 (1972) (placing responsibility for hearings with ALJs will better enable deputy commissioners to perform their administrative responsibilities under the Act); see generally *id.* at 14-15 (ensuring Director's active involvement at all stages of claim-processing under LHWCA); H.R. Rep. No. 1441, 92d Cong., 2d Sess. 12-13 (1972) (same).

That the Director's interest in the resolution of benefit claims is sufficient to confer standing is confirmed by the text and legislative history of the Black Lung Benefits Act, as amended in 1977, Pub. L. No. 95-239, 92 Stat. 95 (BLBA). The BLBA generally incorporates the procedures of the LHWCA, 30 U.S.C. 932(a), and explicitly provides that "[t]he Secretary shall be a party in any proceeding relative to a claim" for black lung benefits. 30 U.S.C. 932(k). The Senate Committee on Human Resources (the successor to the Committee on Labor and Public Welfare that drafted the 1972 amendments to the LHWCA) explained that this provision reflects the intent that the Director have standing under both Acts:

> Some question has arisen as to whether the adjudication procedures applicable to black lung claims incorporating various sections of the amended Longshoremen's and Harbor Workers' Compensation Act *confers standing upon the Secretary of Labor or his designee to* appear, present evidence, *file appeals* or respond to appeals filed with respect to the litigation and appeal of claims. In establishing the Longshore Act procedures it was the intent of this Committee to afford the Secretary the right to advance his views in the formal claims litigation context whether or not the Secretary had a direct financial interest in the outcome of the case. *The Secretary's interest as the officer charged with the responsibility for carrying forth*

> *the intent of Congress with respect to the Act should be deemed sufficient to confer standing on the Secretary or such designee* of the Secretary who has the responsibility for the enforcement of the Act, *to actively participate in the adjudication of claims before* the Administrative Law Judge, Benefits Review Board, and *appropriate United States Courts.*

S. Rep. No. 209, 95th Cong., 1st Sess. 21-22 (1977) (emphases added). "When several acts of Congress are passed touching the same subject-matter, subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject," *Tiger* v. *Western Investment Co.*, 221 U.S. 286, 309 (1911); *Bell* v. *New Jersey*, 461 U.S. 773, 784 (1983). See also *West Virginia Univ. Hospitals, Inc.* v. *Casey*, 499 U.S. 83, 100-101 (1991). That is especially so here. Congress specifically intended that the procedures for administrative and judicial review under the LHWCA and BLBA be the same. To recognize the Director's standing under one Act but not the other would be inconsistent with that intent and would introduce unwarranted complexity into the implementation of the statutory mandates.[11]

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[11] The Director, OWCP, administers both the LHWCA and the BLBA. 20 C.F.R. 701.202(a) and (f). As set forth above, a specific provision of the BLBA (30 U.S.C. 932(k)), as well as its legislative history establish that Congress intended to permit the Director to seek review of Board decisions on BLBA claims, even in the absence of a financial interest in the outcome. Nonetheless, the lower court's constitutional ruling could have implications for the BLBA, which incorporates 33 U.S.C. 921(c) from the LHWCA. Although several courts of appeals, even before the addition of 30 U.S.C. 932(k), recognized the Director's standing to petition for review of Board decisions on black lung claims, the courts gave at least some weight to the Director's interest in those cases in obtaining reimbursement from mine operators for benefits paid from the Black Lung Disability Trust Fund. See *Krolick Contracting Corp.* v. *Benefits Review Bd.*, 558 F.2d 685, 689-690 (3d Cir. 1977); *Director, OWCP* v. *National Mines Corp.*, 554 F.2d 1267, 1271-1272 (4th Cir. 1977); *Director, OWCP* v.

c. The court of appeals correctly viewed 33 U.S.C. 921(c) in this context as authorizing standing as broadly as is permitted by Article III of the Constitution. App., *infra*, 9a n.1; see *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205, 209 (1972). In concluding that the Director lacks the "injury in fact" required for constitutional standing, however, the court of appeals confused the Director's interest in the resolution of LHWCA cases with the interests of private parties, whose standing to litigate the merits of a particular case depends upon an economic or other personal stake in the outcome of a controversy. See *Baker* v. *Carr*, 369 U.S. 186, 204-208 (1962). "[T]he Director in this litigation is no private party required to show 'that *he* has suffered injury in fact' * * * [;] [t]he question in this case is whether or not the interest of the Department of Labor of the United States Government has been adversely affected or aggrieved." *Eastern Coal Corp.*, 561 F.2d at 646. Because the Director appears "not as a private individual in any sense, but as the authorized representative of the Department of Labor" who is entrusted with responsibility for the administration of the LHWCA, *ibid.*, her interest is analogous not to that of private parties, but rather to that of other government officials carrying out their public duties under particular statutes. See, *e.g.*, *United*

Alabama By-Products Corp., 560 F.2d 710, 717 (5th Cir. 1977); *Eastern Coal Corp.*, 561 F.2d at 646; *Director, OWCP* v. *Peabody Coal Co.*, 554 F.2d 310, 336-338 (7th Cir. 1977); see *Donzi Marine*, 586 F.2d at 380 (distinguishing black lung cases on ground that, unlike LHWCA case before the court, government had an interest in establishing its right to recover funds already disbursed). The Director may also, however, wish to petition for review of Board decisions in some BLBA cases in which the Director did not initially find eligibility on behalf of the claimant and interim benefits therefore have not been paid out of the Black Lung Disability Trust Fund. In those cases, the government would not have a pecuniary interest in the case.

States ex rel. Chapman v. *Federal Power Comm'n*, 345 U.S. 153, 155-156 (1953); *In re Debs*, 158 U.S. 564, 584-586 (1895); cf. *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico*, 458 U.S. 592, 607 (1982) (State has parens patriae standing based on the health and well being of its residents in general).

The benefits scheme established by the LHWCA does far more than provide for adjudication and vindication of purely private rights. As a workers' compensation system, it has many of the elements of social insurance, and as such is designed to promote the public interest:

> [T]he entire [workers'] compensation system has been set up and paid for, not by the parties, but by the public. The public has ultimately borne the cost of compensation protection in the price of the product, and it has done so for the specific purpose of avoiding having the disabled victims of industry thrown on private charity or public relief. * * * .

3 A. Larson, *The Law of Workmen's Compensation* § 82.41 (1993); 1 *id.* § 1.20 ("like social insurance, but unlike tort, the right to benefits and amount of benefits are based largely on a social theory of providing support and preventing destitution, rather than settling accounts between two individuals according to their personal deserts or blame"); see *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 268 (1977) (LHWCA, as amended, is remedial legislation that "must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results," quoting *Voris* v. *Eikel*, 346 U.S. 328, 333 (1953)). The United States has an interest in ensuring that claimants receive the maximum benefits to which they are entitled under such protective legislation. See H.R. Rep. No. 1441, 92d Cong., 2d Sess. 12-13 (1972); S. Rep. No. 1125, 92d Cong., 2d Sess. 15

(1972). It may advance that interest through its agent, the Director, in the courts of the United States. Compare, *e.g.*, *Heckman* v. *United States*, 224 U.S. 413, 437- 444 (1912); *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 473-474 (1976).[12]

Given her broad responsibilities and the public interest inhering in them, the Director has a material interest in the administration and application of the LHWCA beyond the narrow range that the court of appeals grudgingly acknowledged. The Director's interest, on behalf of the United States, is engaged every time she concludes that the Board has improperly denied a particular claim. *Shahady*, 673 F.2d at 483; cf. *Eastern Coal Corp.*, 561 F.2d at 645 (Director is "adversely affected or aggrieved" under 33 U.S.C. 921(c) "in that * * * he is seeking what he deems to be lawful administration of the [BLBA] and assisting

[12] Cf. *General Tel. Co.* v. *EEOC*, 446 U.S. 318, 326 (1980) (when EEOC acts under Title VII of the Civil Rights Act of 1964, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination); *Secretary of Labor* v. *Fitzsimmons*, 805 F.2d 682, 692-693 (7th Cir. 1986) (en banc) (Secretary's interest in bringing enforcement action under Employee Retirement Income Security Act is based not only on his duty to protect individual beneficiaries of specific pension programs, but also on the public interest in protecting "the very integrity, heart and lifeline of the program itself."); *Donovan* v. *University of Tex. at El Paso*, 643 F.2d 1201, 1208 (5th Cir. 1981) (Secretary sues to protect the public interest under Fair Labor Standards Act); *United States* v. *Federal Maritime Comm'n*, 694 F.2d 793, 800-802 (D.C. Cir. 1982) (Federal Maritime Commission's order approving rate agreement between shippers interfered with Justice Department's responsibility to enforce antitrust laws, and that injury established that Justice Department was "party aggrieved" entitled to assert public interest under Shipping Act and seek judicial review of Commission order); *United States* v. *Federal Maritime Comm'n*, 655 F.2d 247, 251-252 (D.C. Cir. 1980).

claimants * * * whose awards of benefits have been vacated by the Benefits Review Board, as well as defending the regulations he is charged with administering").

According standing to the Director in these circumstances does not impugn any of the core concerns underlying Article III's "case or controversy" requirement. Here there is a concrete dispute as to the onset date of the claimant's permanent partial disability, the resolution of which will affect the amount of benefits awarded to the claimant. And the Director's presence advocating that a greater payment of benefits by the employer is required "assure[s] that the * * * questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982); see also *Lujan*, 112 S. Ct. at 2136; *Trafficante*, 409 U.S. at 211; *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 112-115 (1979).

3. The court of appeals' ruling presents a serious obstacle to the Director's enforcement of the LHWCA. Under the court of appeals' narrow view of standing, the Director is left powerless to challenge erroneous Board rulings in many circumstances. Although the Act authorizes recovery of attorneys' fees by a prevailing claimant, 33 U.S.C. 928(a), because of the relatively modest amount of most awards, and the significant legal costs and risks associated with appellate review, an individual claimant may lack the incentive or ability to petition for review in a particular case in which his claim is meritorious and important legal issues are involved.

The decision below also undermines the Director's distinct policymaking role under the LHWCA. It is the Director's views on questions of statutory and regulatory interpretation, not the views of the Board, that are entitled to

deference from the courts. See *Director, OWCP* v. *General Dynamics Corp.*, 982 F.2d 790, 795 (2d Cir. 1992); *Zapata Haynie Corp.* v. *Barnard*, 933 F.2d 256, 258 (4th Cir. 1991); *Newport News Shipbuilding & Dry Dock Co.* v. *Howard*, 904 F.2d 206, 208 (4th Cir. 1990); *Boudreaux* v. *American Workover, Inc.*, 680 F.2d 1034, 1046 (5th Cir. 1982) (en banc), cert. denied, 459 U.S. 1170 (1983);[13] see also *Potomac Elec. Power Co.* v. *Director, OWCP*, 449 U.S. 268, 278 n.18 (1980) (Board is not a policymaking agency and its interpretations are not entitled to special deference from the courts); cf. *Mullins Coal Co.* v. *Director, OWCP*, 484 U.S. 135, 159-160 (1987) (Director's construction of BLBA is entitled to deference). Under the Fourth Circuit's ruling, the Director's ability to advance her expert views, and thereby maintain uniform administration of the LHWCA, would be substantially impaired. See, *e.g.*, *Director, OWCP* v. *Bethlehem Steel Corp.*, 949 F.2d 185, 187 (5th Cir. 1991) (LHWCA was conceived out of a "constitutional demand for a nationwide uniformity").

Finally, the test applied by the court below, which was drawn from the Fifth Circuit's decision in *Donzi Marine*, creates confusion over what constitutes injury to a "legitimate administrative interest" of the Director. Compare, *e.g.*, the Fifth Circuit's ruling in *Donzi Marine*, 586 F.2d at 381-382 (Director's legitimate administrative interests are not adversely affected by Board's legal ruling that recreational boat industry employees are not covered by LHWCA), with the Fifth Circuit's more recent decision in *Bethlehem Steel Corp.*, 949 F.2d at 186-187 (Director's

[13] But see *Sea-Land Service, Inc.* v. *Rock*, 953 F.2d 56, 59 (3d Cir. 1992); *American Ship Bldg. Co.* v. *Director, OWCP*, 865 F.2d 727, 730 (6th Cir. 1989) (neither Board nor Director is entitled to special deference).

interest adversely affected by Board ruling concerning when a total disability becomes a partial disability, when three courts of appeals had already rejected Board's position). A more straightforward approach to standing in this context, fully justified under the terms of the LHWCA and fully in accord with the Constitution, would permit the Director to petition for review of any Board decision resolving a benefits controversy that she, as a party to proceedings before the Board, regards as erroneous. The D.C. Circuit has endorsed this approach to the Director's standing, and the Third Circuit has expressed its approval of that approach as well. See pages 10-13, *supra*. The Court should resolve this important and recurring issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

THOMAS S. WILLIAMSON, JR.
Solicitor of Labor

EDWIN S. KNEEDLER
Deputy Solicitor General

ALLEN H. FELDMAN
Associate Solicitor

BETH S. BRINKMANN
Assistant to the Solicitor General

STEVEN J. MANDEL
Deputy Associate Solicitor

MARK S. FLYNN
Senior Appellate Attorney
Department of Labor

MAY 1994

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 92-1864

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, RESPONDENT

v.

JACKIE H. HARCUM, CLAIMANT

On Petition for Review of an Order of
the Benefits Review Board
(90-1287)

Argued: February 5, 1993
Decided: October 29, 1993

Before: ERVIN, Chief Judge, NIENEYER, Circuit Judge, and WARD, Senior United States District Judge for the Middle District of North Carolina, sitting by designation.

OPINION

ERVIN, Chief Judge:

Jackie Harcum ("Claimant"), a former employee of Newport News Shipbuilding & Dry Company ("Newport News"), suffers from a work-related, disabling back injury. As an employee covered under the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 901-950, the Claimant filed a request for compensation benefits, which was partially granted and denied. On appeal, the Director of the Office of Worker's Compensation Programs in the United States Department of Labor ("Director") challenges the Benefits Review Board ("Board") as to its construction of the LHWCA on two grounds. First, the Director asserts that the Board improperly determined that the Claimant's disability shifted from the status of temporary total disability to that of permanent partial disability on May 6, 1988. In addition, the Director challenges the Board's application of a provision of the LHWCA to lessen substantially Newport News's obligation to pay benefits and to shift responsibility for compensation to a special fund organized under the LHWCA. Because we believe the Director lacks standing to raise the first issue, we decline to address it. Finding, however, that the Board erred in implicating the special fund and that the Director is the proper party to redress improper use of the fund, we reverse the Board's decision to limit Newport News's obligation to pay benefits.

I

The Claimant worked for Newport News as a machine installer from February 26, 1963 until May 6, 1988. During his tenure with Newport News, the Claimant suffered a series of back injuries. According to his medical records, the Claimant sustained a lumbar strain on June 3, 1965,

and a more severe lumbosacral strain on February 8, 1966. At the time of this second injury, an x-ray of the Claimant's back revealed a sacral arch defect. The Claimant again experienced a lumbar strain on February 7, 1977, and was unable to work from February 27, 1977 through March 28, 1977 as a result.

After two more related injuries in 1981 and 1983, the Claimant's physician referred him to a neurosurgeon. The neurosurgeon diagnosed the Claimant with a herniated disc in the cervical spine area and performed a hemilaminectomy on January 24, 1984 to remove the disc. The Claimant responded well to the surgery and was able to return to work on March 5, 1984. On October 24, 1984, the Claimant suffered the injury that serves as the subject of this appeal. While bending down in the bilge area of a steam barge, the Claimant was struck in the lower back by a piece of falling grating. After a month of unabated leg and back pain, the Claimant returned to the neurosurgeon. Tests revealed another herniated disc, this time in the lumbar spine area, and on January 11, 1985, the neurosurgeon removed the disc. On March 15, 1985, additional surgery was performed to free a pinched nerve root and remove retained fragments of disc material.

After a protracted recovery, the Claimant returned to light-duty work at Newport News on October 4, 1985, but immediately experienced back pain and was "passed out" of service temporarily to recuperate. Newport News paid the Claimant benefits under the LHWCA for temporary total and temporary partial disability until the Claimant again returned to Newport News's light duty facility in April 1987. On November 4, 1987, the Claimant's neurosurgeon formulated restictions by which he could return to his regular department. The doctor rated the Claimant as having an eighteen-percent whole body impairment and restricted his lifting to thirty pounds. The Claimant also

was to alternate regularly between sitting and standing and to refrain from ladder climbing.

The Claimant returned to his regular department in January 1988, but was unable to perform the necessary tasks. Therefore, on May 6, 1988, the Claimant was passed out of the shipyard once again. Newport News officials informed the Claimant that they would look for another job for him in the shipyard within his restrictions. The Claimant suggests that, based upon this reassurance, he did not look for a job outside of the shipyard at the time he was passed out. In August 1988, however, Newport News's supervisor of employee relations at the shipyard arranged a meeting with the Claimant. At the meeting, the Claimant was told that the shipyard had no work to offer him within his restrictions and that he was being referred to a rehabilitation counselor.

The Claimant met with the rehabilitation counselor for the first time on September 20, 1988, and the two began developing a job placement and rehabilitation program for the Claimant. The Claimant then started his search for a new job. After following several leads supplied by the rehabilitation counselor, the Claimant was able to secure a job with the Hampton Sheet Metal Company ("Hampton Sheet Metal") on February 16, 1989. The Claimant still works at Hampton Sheet Metal in a job that is comfortably within his disability restrictions. At the time of the hearing on this matter before the Administrative Law Judge ("ALJ"), the Claimant was earning $5.00 per hour and working forty hours per week. Subsequent to the Claimant's employment by Hampton Sheet Metal, Newport News requested that the rehabilitation counselor conduct a labor survey of thhe available jobs for which the Claimant may have qualified during the period of May 6, 1988 to February 15, 1989. The completed survey listed eleven job possibilities.

The Claimant filed a request for compensation benefits under the LHWCA, and a hearing was held before an ALJ on October 20, 1989. In addition to the above facts, the parties presented medical opinions of three doctors. A doctor opined, at Newport New's behest, that

> [i]t is obvious the Mr. Harcum's current low back condition was not caused by any one injury. Rather, it is clear that Mr. Harcum's current low back condition is the result of cumulative and repeated lumbar injuries. Each injury aggravated Mr. Harcum's low back problems and made him more susceptible to further back injuries, and each injury increased the severity of the subsequent injuries. This clearly constitutes a pre-existing permanent partial disability, and a cautious employer would not have hired Mr. Harcum with this manifest condition.

Additionally, Mr. Harcum's cervical spine condition also substantally contributes to his current level of disability. As a result of shoulder injuries in 1981 and 1983, surgery was performed on Mr. Harcum's cervical spine. As I noted previously, this equates to a five percent (5%) whole body impairment. I agree with Dr. Peach's statement in his December 1, 1987 letter. Dr. Peach indicated that Mr. Harcum's level of whole body impairment is a result of two surgical procedures: the 1984 surgery on Mr. Harcum's cervical spine and the 1985 surgery on his lumbar spine. The cervical and lumbar injuries, and the surgery they necessitated, clearly combined to create a greater impairment than would otherwise have occurred. This condition was manifest in Mr. Harcum's clinical record, and a cautious employer would not have hired him with this condition

Dr. Peach, the Claimant's neurosurgeon, indicated, in a December 1, 1987 letter, that the Claimant's permanent partial disability was due in part to both surgical procedures involving the Claimant's cervical and lumbar spinal areas. Another doctor opined that "[i]t is clear that Mr. Harcum had a pre-existing partial impairment or disability that was materially increased by the second injury and disc herniation."

After disposing of two issues not raised on this appeal, the ALJ addressed whether the Claimant was entitled to a temporary total disability award from May 6, 1988 until February 16, 1989. Citing *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157-59 (1989), the ALJ established the date of maximum medical improvement as the onset of permanent partial disability. As the parties had stipulated that date to be December 7, 1987, several months before the Claimant was passeed out of the shipyard permanently, the ALJ determind that, for the purpose of benefit payments, permanent partial disability began when the Claimant was passed out or on May 6, 1988. Alternatively, the ALJ held that Newport News had shown successfully the availability of suitable alternate jobs that the Claimant was capable of performing from May 6, 1988 to February 15, 1989. Therefore, the Claimant's disability ceased to be a total disability on May 6, 1988, when the Claimant regained wage-earning capacity.

The ALJ concluded that, from May 6, 1988, the Claimant should have received compensation based on a permanent partial disability rather than a temporary total disability. Based on the improper classification, the Claimant had received $101.34 per week in excess benefits during the period from May 6, 1988 to February 16, 1989. The ALJ held that Newport News was entitled to a credit against future benefits payments owed to the Claimant in

the amount of $101.34 per week for approximately forty weeks, the period of the overpayment.

The ALJ addressed, as the final issue, whether Newport News was entitled to a reduction in the benefits it was required to pay the Claimant pursuant to section 8(f) of the LHWCA, 33 U.S.C. § 908(f). Section 8(f) limits an employer's responsibility to pay disability benefits to one hundred and four weeks if the employee's work-related injury was substantially exacerbated by a pre-existing permanent partial disability. *See id.* § 908(f)(1). Finding that Newport News had established each of the elements needed to enjoy section 8(f) relief, the ALJ limited Newport News's obligation to pay weekly benefits to the Claimant accordingly.

The Director appealed the ALJ's decision to the Benefits Review Board as a "party in interest" pursuant to 33 U.S.C. § 921(b)(3). On appeal, the Board affirmed the ALJ's decision in all respects, but with one clarification. The ALJ had relied, for its determination of the commencement of partial disability, on *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155 (1989), which the Ninth Circuit court of appeals subsequently reversed. *Stevens v. Director, Office of Workers' Compensation Programs*, 909 F.2d 1256 (9th Cir. 1990), *cert. denied sub nom. Lockheed Shipbuilding Co. v. Director, Office of Workers' Compensation Programs*, 498 U.S. 1073 (1991). The Ninth Circuit court held that the date total disability becomes partial is the date on which the employer establishes that suitable alternate employment is available, not the date on which maximum medical improvement occurs. *Id.* at 1259-60. The Board vacated "the administrative law judge's reliance on the Board's decision in *Stevens* to commence Claimant's award of benefits for permanent partial disability on May 6, 1988." The Board

noted, however, that the ALJ alternatively held that May 6, 1988 was the proper date because Newport News had established job availability as of that date. On that basis, the Board affirmed the ALJ's decision.

The Director petitioned this court for review of the Board's decision pursuant to 33 U.S.C. § 921(c). The Director raises two issues on appeal: (1) whether the Board erred as a matter of law in accepting the ALJ's determination of the Claimant's injury status change from that of temporary total disability to that of permanent partial disability; and (2) whether, in determining Newport News's entitlement to section 8(f) relief, the Board applied the incorrect standard.

II

The ALJ is the only adjudicative body handling a benefits determination that may make factual findings. *See Lavino Shipping Co. v. Donovan,* 267 F.2d 59, 61-62 (3d Cir. 1959). Therefore, the Board's review of the ALJ's factual findings is limited by the statutory requirement that "[t]he findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole." 33 U.S.C. § 921(b)(3). We review the Board's decision for errors of law and to ascertain whether the Board adhered to its statutorily-mandated standard for reviewing the ALJ's factual findingss. *Newport News Shipbuilding & Dry Dock Co. v. Tann,* 841 F.2d 540, 543 (4th Cir. 1988).

The Board's adjudicatory interpretation of the LHWCA is entitled to no special deference because the Board serves no policy-making role. *See Zapata Haynie Corp. v. Barnard,* 933 F.2d 256, 258 (4th Cir. 1991). The Director is charged with administration of the LHWCA; therefore, we should respect a reasonable interpretation of the

LHWCA by the Director. *See id.; Newport News Shipbuilding & Dry Dock Co. v. Howard,* 904 F.2d 206, 209 (4th Cir. 1990). We are guided by *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842-43 (1984) when deciding whether to accept a reasonable interpretation of the LHWCA advocated by the Director. *Zapata,* 933 F.2d at 258; *Howard,* 904 F.2d at 208. Absent clear congressional intent as to the proper construction of the LHWCA, we must give deference to the Director's reasonable and permissible interpretation. *Zapata,* 933 F.2d at 259; *Howard,* 904 F.2d at 209.

Before reviewing the Board's determinations, however, we must address whether the Director has standing to petition this court for review of the issues raised.[1] The LHWCA permits "[a]ny person adversely affected or aggrieved by a final order of the Board [to] obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred." 33 U.S.C. § 921(c). Unlike the provision of the LHWCA permitting "any party in interest" to seek review before the Board, *id.* § 921(b)(3), section 921(c) requires that the appellant be a "person . . . aggrieved," *id.* § 921(c), or a party that has suffered an injury in fact, economic or otherwise. *See Director, Office of Workers' Compensation Progams v. Newport News Shipbuilding & Dry Dock Co.,* 676 F.2d

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[1] Although not raised by the parties, standing presents an issue of the very justiciability of the claims ~~persents~~ and strikes at the core of the constitutional limitations placed upon this court by Article III of the Constitution. In this case, the LHWCA codifies the constitutional requirement that limits standing to those person who can allege "that they personally have suffered or imminently will suffer an injury." Erwin Chemerinsky, *Federal Jurisdiction* § 2.3.2, at 52 (1989); *see* 33 U.S.C. § 921(c). Before we can address the merits of the Director's appeal, we must determine whether this basic and nonwaivable mandate is met.

110, 113 (4th Cir. 1982). We must decide whether the issues raised on appeal represent an actual injury to the Director.

The Fifth Circuit court of appeals was the first circuit court to address the extent of the Director's standing to appeal pursuant to 33 U.S.C. § 921(c). *See Director, Office of Workers' Compensation Programs v. Donzi Marine, Inc.*, 586 F.2d 377 (5th Cir. 1978). In *Donzi Marine,* the Director questioned the extent to which the LHWCA applied to the employees of small boat builders, marine operators, and other firms in the recreational boating industry. *Id.* at 377. The court recognized that, before it could address the merits of the appeal, it must resolve "whether the Director, the sole petitioner, is 'adversely affected or aggrieved' by the Board's decision [not to award benefits] as required by section 921(c)." *Id.* at 379 (quoting 33 U.S.C. § 921(c)).

The *Donzi Marine* court began its analysis by outlining the responsibilities conferred upon the Director by the LHWCA. The court concluded that the Director would have standing only if an interest of the Director arising from his or her specifically delegated responsibilities was adversely affected by the Board's decision. *Id.* The LHWCA confers four responsibilities upon the Director: (1) the performance of an assortment of general administrative and supervisory responsibilities, *e.g.* 33 U.S.C. §§ 906(b)(3), 907, 914, 919, 923(b), 930, 932; (2) the provision of assistance to persons covered by the LHWCA in processing their claims and receiving compensation, *id.* § 939; (3) the promulgation and enfocement of safety rules and regulations, *id.* § 941; and (4) the duty to administer the special fund established for the payment of certain benefits, *id.* § 944. *See Donzi Marine,* 586 F.2d at 379-80.

The court suggested that the nature of the Director's responsibilities presented two avenues by which the Director might have standing to petition for appellate review. First, the Director may redress Board decisions that adversely affect the Director's legitimate administrative interests. *Id.* at 381. For example, if a Board decision substantially augmented the nature of the administrative duties delegated to the Director, increased the Director's necessary expediture of administrative resources, or created confusion as to how the Director was to carry out specific functions, the Director's responsibilities under the LHWCA would be bound up sufficiently with the merits of the appeal to evidence a cognizable administrative injury. *Id.* at 381-82.

In addition, the Director may seek review of a Board decision adversely impacting the special fund created to pay employees in certain instances in which the employer is relieved of that obligation. *Id.* at 380-81; *see* 33 U.S.C. § 944. If the Board's decision favors payment out of the fund as opposed to by the employer, the depletion of the fund represents an injury in fact to the Director as administrator of the fund.

The *Donzi Marine* court determined that, under the facts at hand neither the Director's legitimate administrative interests nor his or her pecuniary interest in protecting the fund was implicated. *Id.* at 380-82. Therefore, the court held that

> [the Director] does not meet the standing requirement imposeed by section 921(c) and may not, on his own initiative and without the company of the claimant, petition to review the Board's decision to this court. At bottom, the Director appears here to claim no more than an interest in receiving from the Board an interpretation of the [LHWCA]'s coverage consistent

> with his own belief as to what that coverage should be. The mere fact that the Board has chosen not to accept the Director's view does not aggrieve the Director in any meaningful sense and, hence, cannot give him standing to appeal. We are unable, therefore, under the statute to render the advisory legal opinion which the Director seeks by his petition to this court.

Id. at 382; *see also Director, Office of Workers' Compensation Programs v. Bethlehem Steel Corp.*, 620 F.2d 60, 63 (5th Cir. 1980) (holding that Director is not a person "adversely affected or aggrieved" by an order of the Board which denies disability payments under the LHWCA); *but see Shahady v. Atlas Tile & Marble Co.*, 673 F.2d 479, 483 (D.C. Cir. 1982) ("[T]he Director's general supervisoryy and enforcement interest, apart from any pecuniary interest, is sufficient to confer upon the Director standing to file a petition for review under section 921(c).").

We adopted the clear logic of the Fifth Circuit court's *Donzi Marine* holding in *Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding & Dry Dock Co.*, F.2d 110 (4th Cir. 1982).[2] In that case, we

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[2] We had decided previously that the Director is not a proper *respondent* in a petition for review under section 921(c), "although upon application and for good cause shown he may be permitted to intervene therein." *I.T.O. Corp. v. Benefits Review Bd.* (*I.T.O. Corp. II*), 563 F.2d 646, 648 (4th Cir. 1977) (en banc) (adopting in full the view expressed in *I.T.O. Corp. v. Benefits Review Bd.* (*I.T.O. Corp. I*), 542 F.2d 903, 906-909 (4th Cir. 1976) (en banc), *vacated sub nom. Adkins v. I.T.O. Corp.*, 433 U.S. 904(1977)). In *I.T.O. Corp. I*, we recognized that section 921(c) requires an injury in fact, economic or otherwise. 542 F.2d at 907. We held the Director's asserted stake—that "[h]e is directly affected in his official capacity by the correctness of the Board's decision involving the proper scope of coverage of the Act with whose administration he is charged"—was not sufficient to "confer upon the Director any specific interest in the proper administration of the Act." *Id.* at 907-08.

faced an appeal by the Director of the Board's decision that section 8(f) of the LHWCA limited the employer's duty to pay benefits to one hundred and four weeks. *Id.* at 112. Before addressing the merits of the appliability of the section 8(f) limitation, we question whether the Board's decision sufficiently implicated an administrative or economic interest of the Director so as to give rise to a redressable injury. The Board's decision would allow the employee to draw benefits from the LHWCA's special fund after one hundred and four weeks of employer compensation. We recognized that "the Director has an obligation to protect [the fund] from unjustified claims," *id.* at 113, and, therefore, that the Director may be best situated to complain when the fund is at risk of being improperly accessed, *id.* at 114. Noting that this grievance represented a valid injury, we held that

> the fact that the Director in this case has an additional interest in protecting the fiscal integrity of the special fund convinces us that the Director has standing to appeal the Board's decision.

Id.

Applying this analysis to the facts of the case at hand, we acknowledge that the Director clearly has standing to pursue an appeal on the applicability of the section 8(f) limitations pursuant to our holding in *Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding & Dry Dock Co.*, 676 F.2d 110, 114 (4th Cir. 1982). The appealability of the first issue—the timing of the onset of partial disability—is more problematic. The Director asserts that the Board misapprehended the LHWCA's requirements for a detrmination of partial disability. The Director's claim challenges the Board's construction of the LHWCA, but does not press the remediation of an administrative or economic injury suffered by

the Director directly. The Board's construction of partial disability commencement does not alter the Director's ability to carry out his or her responsibilities under the LHWCA or to protect the fiscal integrity of the special fund.[3] We hold, therefore, that the Director has not persented a cognizable injury through the appeal of the partial disability issue and that we must refrain from addressing the merits of this issue based on the Director's lack of standing to raise it.

III

Turning to the merits of this appeal for which the Director has standing, we confront the issue whether, in determining Newport News's entitlement to section 8(f) relief, the Board applied the incorrect standard.

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[3] The only conceivable way in which the special fund might be implicated is if Newport News becomes insolvent and is no longer able to make the payments required under the LHWCA. If such a plight should befall Newport News, the Secretary of Labor has the discretion to make payments from the special fund to the Claimant. *See* 33 U.S.C. § 918(b). The possibility that the fund will be accessd under these circumstances is too tenuous to represent an injury in fact to the Director. Additionally, the position that the Director presses on appeal would have an unfavorable effect on the fund if tapped pursuant to section 918(b). The Board's holding permits Newport News to credit its payments due to the Claimant by $101.34 per weeks. If we were to reverse the Board's decision, on remand the ALJ could decide that the credit is not due at all or is available for more limited number of weeks. A decision adjusting the credit downward would increase the aggregate amount of compensation that Newport News owes the Claimant; therefore, if Newport News were to become insolvent, the burden on the fund would be larger than possible under the Board's current decision. This possiblity further emphasizes the absence of an injury to the Director resulting from the Board's decision to establish partial disability on May 6, 1988.

Section 8(f) of the LHWCA serves to limit the amount of benefits an employer must pay an employee for a work-related injury when the injury was preceded by a permanent partial disability. The section provides, in pertinent parts:

> (f) Injury increasing disability:
>
> (1) In any case in which an employee having an existing permanent partial disability suffers an injury, the employer shall provide compensation for such disability as is found to be attributable to that injury based upon the average weekly wages of the employee at the time of the injury. . . . In all other cases of total permanent disability or of death, found not to be due solely to that injury, of an employee having an existing permanent partial disability, the employer shall provide . . . compensation payments or death benefits for one hundred and four weeks only. . . .
>
> In all other cases in which the employee hs a permanent partial disability, found not to be due solely to that injury and such disability is materially and substantially greater than that which would have resulted from the subsequent injury alone, the employer shall provide . . . compensation for one hundred and four weeks only.

33 U.S.C. § 908(f)(1). In other words, when an employee, who has a pre-existing permanent partial disability, sustains an additional work-related injury that results in permanent partial disability, the employer must provide compensation for one hundred and four weeks only, if: (1) the ultimate permanent partial disability is due to both the work-related injury and the pre-existing partial disability, and; (2) the ultimate permanent partial disability is materially and substantially greater than a disability from

the work-related injury alone would be.[4]

To establish section 8(f) relief, the employer must show that the employee had a pre-existing permanent partial disability and that this disability was manifest to the employer prior to the subsequent work-related injury.[5] The employer also must establish that the subsequent work-related injury alone would not have caused the employee's ultimate permanent partial disability and that the ultimate permanent partial disability materially exceeds the disability which would have resulted in the absence of the pre-existing permanent partial disability. *See Id.; Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding & Dry Dock Co.*, 676 F.2d 110, 114 (4th Cir. 1982).

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[4] For the remainder of this discussion, we will refer to the conditions giving rise to the first disability as the "pre-existing permanent partial disability"; the disability that serves as the basis for the current claim for benefits as the "ultimate permanent partial disability"; and the injury that culminated in the ultimate permanent partial disability as the "work-related injury."

[5] Although section 8(f) itself does not require the employer's manifest knowledge of the initial injury, courts have added this requirement to further the policy behind the limitation provision. *See, e.g., Newport News Shipbuilding & Dry Dock Co. v. Harris*, 934 F.2d 548, 550-51 (4th Cir. 1991); *Lambert's Point Docks, Inc. v. Harris*, 718 F.2d 644, 648 (4th Cir. 1983). Section 8(f) operates to prevent employers from discriminating against disabled employees by firing or refusing to hire them based on the increased risk of work-related injury their pre-existing permanent partial disability poses. Courts have reasoned that if the employer has no knowledge of the pre-existing permanent partial disability, the employer cannot use it as a basis for discrimination; therefore, an employer must have known about a pre-existing permanent partial disability to seek relief from its impact on the ultimate permanent partial disability. *See, e.g., Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding & Dry Dock Co.*, 676 F.2d 110, 114 n.5 (4th Cir. 1982).

The parties agree that the Claimant suffered from a pre-existing permanent partial disability and that the disability was manifest to the employer. The parties disagree, however, on the contribution element. Newport News advances the Board's decision that the section 8(f) limitation is available only when the employee's pe-existing permanent partial disability combines with the disability caused by the employee's subsequent injury "to cause a greater degree of impairment than that caused by the second injury alone." In other words, Newport News contends that an employer may seek section 8(f) relief any time a pre-existing permanent partial disability exists and contributes to a subsequent work-related injury.

The Director asserts that the section 8(f) limitation is available only when the employee's pre-existing permanent partial disability causes the employer to incur more compensation liability than it would had the employee not been disabled at the time of the subsequent work-related injury. The Director suggests the analysis should involve comparing a healthy employee with the pre-existing permanent partial disability. If a healthy employee's level of disability would be similar to the disabled employee's after suffering the subsequent work-related injury, then the pre-existing permanent partial disability does not make the ultimate disability materially and substantially greater.

The parties' interpretations of section 8(f) differ in how they define the word "disability." Newport News's position requires the equation of "disability" with "impairment." Thereby, an employee's pre-existing permanent partial disability contributes to a subsequent work-related injury if it causes the employee to suffer a greater level of physical impairment. In this case, greater impairment was demonstrated by the testimony of Dr. Harmon, who opined that the Claimant's cervical spine surgery resulted

in a five-percent whole boy impairment. He further suggested that this five-percent impairment joined with the subsequent lumbar injury "to create a greater impairment than would otherwise have occurred."

The Director's position utilizes the statutory definition of "disability" to construe section 8(f). The LHWCA defines "disability" as an "incapacity because of the injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Grafting this definition of disability into section 8(f) renders the following construction. The employer only should benefit from the section's limitation when the employee's pre-existing permanent partial disability contributes to the ultimate permanent partial disability to decrease the employee's overall wage-earning capacity. The Director contends that, if the pre-existing permanent partial disability only causes the ultimate permanent partial disability to be more physically impairing, but does not decrease the employee's overall capacity to earn, then the pre-existing permanent partial disability does not cause the ultimate disability to be "materially and substantially greater than that which would have resulted from the subsequent injury alone." 33 U.S.C. § 908(f)(1).

We reject both parties' constructions of section 8(f). Newport News's and the Board's interpretations require a showing that the pre-existing permanent partial disability combined with the Claimant's subsequent work-related injury to cause a greater degree of impairment than that which would have been caused by the work-related injury alone. Under Newport News's purported interpretation, an employer need only show medical evidence that a percentage of whole body impairment existed before the work-related injury, that a greater percentage of whole body impairment exists after the work-related injury, and that the ultimate permanent partial disability was causally

connected to the earlier impairment to satisfy its burden on the contribution element.[6] This showing eviscerates the requirement from section 8(f) that the ultimate permanent partial disability be *materially and substantially* greater than a disability from the work-related injury alone would be, by overlooking the possibility that the work-related injury alone could cause virtually the same level of disability as that manifested in the ultimate permanent partial disability through the contribution of the pre-existing permanent partial disability.

The Director suggests an interpretation of section 8(f) that allegedly will address the magnitude of the relationship between the ultimate permanent partial disability and a disability arising from the work-related injury alone. By requiring the employer to show that it incurs a larger compensation liability based on the ultimate permanent partial disability, the Director contends that the employer will

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[6] In support of its proposition, Newport News relies largely on our decisions in *Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding & Dry Dock Co.*, 737 F.2d 1295, 1298-99 (4th Cir. 1984); *Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding & Dry Dock Co.*, 676 F.2d 110, 115 (4th Cir. 1982); *John T. Clark & Son of Maryland, Inc. v. Benefits Review Bd.*, 621 F.2d 93, 95-96 (4th Cir. 1980); and *Maryland Shipbuilding & Drydock Co. v. Director, Office of Workers' Compensation Programs*, 618 F.2d 1082, 1085 (4th Cir. 1980). We conclude that these cases are not relevant to the issues at hand, however, because they deal with an ultimate permanent *total* disability. An employer is entitled to section 8(f) relief from fully compensating a permanent total disaility when "the employee is totally and permanently disabled, and the disability is found not to be due solely to that injury." 33 U.S.C. § 908(f)(1). Unlike the case of a permanent partial disability, under the circumstances of permanent total disability, the employer need not establish that the ultimate disability is materially and substantially greater than the disability otherwise would be due solely to the work-related injury.

establish that the ultimate permanent partial disability must be materially and substantially greater than that which would have resulted from the work-related injury alone. The Director's construction of section 8(f) involves a mechanical grafting of the statutory definition of disability found at 33 U.S.C. § 902(10) into the language of section 8(f), an approach rejected by the Supreme Court in *Lawson v. Suwannee Fruit & Steamship Co.*, 336 U.S. 198, 206 (1949).[7]

Because we find Newport News's construction of section 8(f) to overlook a basic premise of the section and we are compelled by *Lawson v. Suwannee Fruit & Steamship*

[7] *Lawson* presented the issue whether, in an earlier but substantially similar version of section 8(f), the pre-exiting permanent partial disability must be an economic disability. The Claimant had experienced a previous noncompensable partial disability, and sought compensation for an ultimate permanent partial disability triggered by a subsequent work-related injury. *Lawson v. Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 199 (1949). Recognizing that the LHWCA provides a statutory definition for disability, the Court noted that incorporation of this definition into section 8(f) would require the employer to pay total compensation, while applying a broader meaning to disability would implicate the special fund for a portion of the compensation benefits. *Id.* at 201.

Pointing to Congress's intent in enacting section 8(f) to prevent employers from declining to hire or firing employees with disabilities of any nature that would put them at an increased risk of work-related injury, the Court stated:

> If we read the definition into § 8(f)(1) in a mechanical fashion, we create obvious incongruities in the language, and we destroy one of the major purposes of the second injury provision: the prevention of employer discrimination against handicapped workers. We have concluded that Congress would not have intended such a result.

Id. at 201-02. The Court went on to hold that "the term 'disability' was not used as a term of art in § 8(f)(1)." *Id.* at 206.

Co.[8] to reject the Director's construction, we now turn to the task of discerning independently the reading of section 8(f) by which the Board and the ALJ are governed. To do this, we look again at the language of the statute:

> (f) Injury increasing Disability:
>
> (1) In any case in which an employee having an existing permanent partial disability sufferes an injury, the employer shall provide compensation for such disability as is found to be attributable to that injury based upon the average weekly wages of the employee at the time of the injury. . . . In all other cases of *total* permanent disability or of death, found not to be due solely to that injury, of an employee having an

[8] Recently, the Supreme Court addressed the proper construction of similar terms appearing in different sections of the LHWCA. *See Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. __, 120 L.Ed. 2d 379 (1992). The Director suggests that this case should alter our application of *Lawson*, In *Cowart*, the Supreme Court was asked to construe the undefined term "person entitled to compensation" found in section 33(g)(1) of the LHWCA. *Id.* at 386; *see* 33 U.S.C. § 933(g)(1). In rendering its construction, the Court noted it must consider other provisions of the LHWCA containing the same term. The Court rejected the Board's construction of section 33(g)(1), holding that

> [the Board] had adopted differing intrpretations of the identical language in section 33(f) and 33(g). This result is contrary to the basic canon of statutory construction that identical terms within an Act bear the same meaning. The Board's willingness to adopt such a forced and unconventional approach does not convince us we should do the same.

Cowart, 120 L.Ed. 2d at 391.

While the Court's holding in *Cowart* serves to advance consistent contruction of a single term throughout the LHWCA, it does not expressly disavow the Court's earlier position in *Lawson* as to the construction of section 8(f). Without clearer guidance from the Court, we continue to be bound by it precedent. Therefore, the Director's attempt to have us apply the LHWCA' statutory definition of "disability" to section 8(f) based on *Cowart* is in vain.

existing permanent partial disability, the employer shall provide . . . compensation payments or death benefits for one hundred and four weeks only. . . .

In all other cases in which the employee has a permanent *partial* disability, found not to be due solely to that injury, *and such disability is materially and substantially great than that which would have resulted from the subsequent injury alone,* the employer shal provide . . . compensation for one hundred and four weeks only.

33 U.S.C. § 908(f)(1) (emphasis added).

To establish section 8(f) relief when an employee is permanently totally disabled, the employer must establish: (1) that the employee seeking compensation had an "existing permanent partial disability" before the occurrence of the work-related injury; (2) that the pre-existing permanent partial disability was manifest to the employer; and (3) that the ultimate permanent total disability is "not [ ] due solely to th[e work-related] injury." *Id.; see Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding & Dry Dock Co.*, 676 F.2d 110, 114 (4th Cir. 1982). When an employee is permanently partially disabled, but not totally disabled, section 8(f) informs us that the employer must make the additional showing that the ultimate permanent partial disability "is materially and substantially greater than that which would have resulted from the subsequent injury alone." 33 U.S.C. § 908(f)(1); *see also Two "R" Drilling Co. v. Director, Office of Workers' Compensation Programs,* 894 F.2d 748, 750 (5th Cir. 1990) (recognizing that a "heavier burden" is placed on the employer to obtain section 8(f) relief in the case of a permanently partially disabled employee).

To satisfy this additional prong of the contribution element, the employer must show by medical evidence or otherwise that the ultimate permanent partial disability

materially and substantially exceeds the disability as it would have resulted from the work-related injury alone. A showing of this kind requires quantification of the level of impairment that would ensue from the work-related injury alone. In other words, an employer must present evidence of the type and extent of disability that the claimant would suffer if not previously disabled when injured by the same work-related injury. Once the employer establishes the level of disability in the absence of a pre-existing permanent partial disability, an adjudicative body will have a basis on which to determine whether the ultimate permanent partial disability is materially and substantially greater.

In this case, both the ALJ and the Board failed to require a showing of this "materiality prong" of the contribution element. We hold that, by not applying this component of the statutory standard, the ALJ and the Board erred as a matter of law in awarding section 8(f) relief to Newport News. In addition, we note that Newport News put on no evidence relevant to the "materiality prong."[9]

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[9] Newport News showed that the Claimant suffered from a pre-existing permanent partial disability in the cervical spine area that created a five-percent whole body impairment. After the work-related injury at issue, the Claimant suffered an ultimate permanent partial disability that produced whole body impairment of eighteen percent. Newport News introduced the following evidence concerning the correlation between the ultimate permanent partial disability and the disability that would have resulted from the work-related injury alone:

> . . . . Mr. Harcum's cervical spine condition also substantially contributes to his current level of disability. . . . The cervical and lumbar injuries, and the surgery they necessitated, clearly combined to create a greater impairment than would otherwise have occurred.

From this evidence, the ALJ concluded, and the Board affirmed, that the Claimant's pre-existing permanent partial disability combined with

IV

Concluding that the Director has no standing to raise the issue whether the Board erred as a matter of law in accepting the ALJ's determination of the Claimant's injury status change from that of temporary total disability to that of permanent partial disability, we decline to address that issue altogether. We reverse the ALJ's decision to assess the special fund for compensation payments to the Claimant after one hundred and four weeks of payments by Newport News pursuant to the provisions of section 8(f), and we remand for further proceedings before the ALJ not inconsistent with this opinion.

REVERSED AND REMANDED

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his subsequent work-related injury to cause a greater degree of disability than that which would have resulted solely from the work-related injury. This conclusion stops short of identifying whether the ultimate permanent partial disability is materially and substantially greater than a disability caused by the work-related injury only.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 92-1864 and 90-1287

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, RESPONDENT

v.

JACKIE H. HARCUM, CLAIMANT

On Petition for Rehearing with Suggestion for Rehearing In Banc

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FILED January 7, 1994

Respondent-employer filed a petition for rehearing with suggestion for rehearing in banc. No member of the Court requested a poll on the respondent-employer's suggestion for rehearing in banc. The original judicial panel voted to deny the petition for rehearing.

The government filed a petition for rehearing with suggestion for rehearing in banc. A member of the Court requested a poll on the suggestion for rehearing in banc, and a majority of the judges voted to deny rehearing in banc. Judges Hall and Murnaghan voted to rehear the case in banc, and Judges Ervin, Widener, Phillips, Wilkinson, Wilkins, Niemeyer, Hamilton, Luttig, Williams, and Michael voted against rehearing in banc. Judge Russell was disqualified and did not participate in the poll. The original judicial panel voted to deny the government's petition for rehearing.

The Court denies the petitions for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Ervin, with the concurrence of Judge Niemeyer and Judge Ward.

For the Court,

/s/ Bert M. Montague
Clerk

APPENDIX C

U.S. DEPARTMENT OF LABOR

BRB No. 90-1287

JACKIE H. HARCUM, CLAIMANT-RESPONDENT

v.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, SELF-INSURED EMPLOYER-RESPONDENT

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

DECISION AND ORDER

DATE ISSUED: May 28, 1990

Appeal of the Decision and Order of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Before: STAGE, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and LIPSON, Administrative Law Judge.*

* Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. § 921(b)(5) (Supp. V 1987).

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order (88-LHC-1635) of Administrative Law Judge Daniel A. Sarno, Jr., awarding benefits on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 340 U.S. 359 (1965); 33 U.S.C. § 921(b)(3).

Claimant was injured on October 21, 1984, during the course of his employment as a machinery installer when steel grating fell onto his lower back. He required a lumbar laminectomy, and a second operation to remove scar tissue. Employer voluntarily paid benefits for temporary total and temporary partial disability, 33 U.S.C. § 908(b), (e), for various periods until claimant was able to return to sustained light-duty employment in April 1987. ALJ Ex. 1. The parties stipulated that claimant reached maximum medical ipmrovement on December 7, 1987. On January 18, 1988, claimant returned to his usual employment as a machinery installer. He was unable to perform his heavy-duty regular employment due to residuals from the work injury, and employer therefore released claimant on May 6, 1988. In September 1988, employer referred claimant to a vocational counselor, who developed a placement program for claimant. Claimant obtained alternate employment with another employer as a tool room clerk on February 16, 1989, one month after he actually began applying for jobs with the counselor's assistance. Employer voluntarily paid benefits for total disability from May 6,

1988 to February 16, 1989, and employer thereafter voluntarily paid benefits for continuing permanent partial disability, 33 U.S.C. § 908(c)(21).

A formal hearing was held on October 29, 1989, to resolve the issues of claimant's entitlement to benefits for lost overtime when he worked for employer in light-duty employment, his entitlement to benefits for temporary total disability from January 18, 1988 to February 16, 1989, and employer's application for relief from continuing compensation liability pursuant to Section 8(f), 33 U.S.C. § 908(f). The administrative law judge found that claimant was entitled to temporary partial disability benefits for lost overtime from April 11 to December 7, 1987, and he also awarded claimant benefits for temporary partial disability from January 18, until May 6, 1988, based on his finding that claimant was working in employment beyond his medical restrictions. These findings are not appealed. The administrative law judge next determined that claimant is entitled to continuing benefits for permanent partial disability commencing on May 6, 1988, based on employer's later showing of suitable alternate employment in February 1989. Employer was awarded Section 8(f) relief.

On appeal, the Director challenges the commencement date of claimant's award for permanent partial disability, arguing that it should begin on February 16, 1989, when claimant secured alternate employment as a tool room clerk, and that claimant is entitled to permanent total disability until that date. The Director also challenges the administrative law judge's award of Section 8(f) relief. Employer responds, urging affirmance. Claimant responds in support of the Director's argument that his permanent disability award should commence on February 16, 1989.

The Director first argues that the administrative law judge erred by relying on the Board's decision in *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155 (1989), *rev'd in*

pert. part sub nom. Stevens v. Director, OWCP, 909 F.2d 1256, 23 BRBS 89 (CRT) (9th Cir. 1990), *cert. denied,* 111 S.Ct. 798 (1991), as authority to begin the permanent partial disability award on May 6, 1988. The administrative law judge found that the job claimant obtained as a tool room clerk in February 1989 met employer's burden of demonstrating the availability of suitable alternate employment dating back to the day claimant was released by employer. He also found irrelevant claimant's argument that he is entitled to total disability benefits until February 16, 1989, because he delayed his job search in reliance on employer's promise after his release that it would seek light-duty work for him at its facility, and employer's subsequent contracting with a vocational rehabilitation specialist to assist claimant in securing alternate employment.

In *Stevens, supra,* the Board held that when employer establishes the availability of suitable alternate employment, an award for permanent partial disability should commence on the date of maximum medical improvement. *Stevens,* 22 BRBS at 157-158. The Board's holding was reversed on appeal to the United States Court of Appeals for the Ninth Circuit. *See Stevens,* 909 F.2d at 1259-1260, 23 BRBS at 94 (CRT). The court held that the date employer establishes that suitable alternate employment is available is the date total disability becomes partial. *Id.; accord Director, OWCP v. Berkstresser,* 921 F.2d 306, 24 BRBS 69 (CRT) (D.C. Cir. 1990); *Palombo v. Director, OWCP,* 937 F.2d 70, 25 BRBS 1 (CRT) (2d Cir. 1991). The court commented that its holding would not prevent an employer from retroactively establishing the availability of suitable alternate employment at the date of maximum medical improvement, even if several years had passed, as employer may submit a retrospective job survey which the administrative law judge may find to be credible.

See Stevens, 909 F.2d at 77, 23 BRBS at 95 (CRT); *accord Palombo, supra,* 937 F.2d at 1260, 25 BRBS at 12 (CRT). Although the instant cases arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, the Board held in *Rinaldi v. Gernal Dynamics Corp.,* 25 BRBS 128 (1991), *modifying on reconsideration,* BRB No. 88-1721 (Jan. 29, 1991) (unpub.), that the court's rationale in *Stevens, supra,* will be applied in all circuits. Accordingly, the administrative law judge's reliance on the Board's decision in *Stevens* to commence claimant's award of benefits for permanent partial disability on May 6, 1988 is vacated. Pursuant to *Rinaldi, supra,* we hold that claimant's award should commence on the earliest date employer established the availability of suitable alternate employment. *See Rinaldi,* 25 BRBS at 131.

Nevertheless, we affirm the administrative law judge's award of permanent partial disability dating from May 6, 1988, as employer established suitable alternate employment at this time. In the instant case, after claimant obtained the position as a tool room clerk in February 1989, employer requested that Charles DeMark, a vocational consultant, identify specific job opportunities within claimant's work restrictions that were available between May and November 1988. Mr. DeMark located specific job opportunities as a desk clerk, service station attendant, and dispatcher that were actually available during that time, and which claimant's treating physician, Dr. Peach, approved as within claimant's injury-related work restrictions. EX 19-20. Specifically, three of the desk clerk positions were available in May 1988. EX 19 at 2-3. This uncontradicted evidence establishes, as a matter of law, that employer demonstrated the availability of suitable alternate employment as of May 1988. *See Newport News Shipbuilding & Dry Dock Co. v. Tann,* 841 F.2d 540, 21 BRBS 10 (CRT) (4th Cir. 1988); *Hogan v. Schiavone Ter-*

minal, Inc., 23 BRBS 290 (1990); *see generally New Orleans (Gulfwide) Stevedores, Inc. v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also Rieche v. Tracor Marine, Inc.*, 16 BRBS 272 (1984).

Claimant, however, may rebut employer's showing of suitable alternate employment by showing that he diligently tried but was unable to obtain suitable alternate employment during the period after which employer established the availability of job opportunities within claimant's medical restrictions. *See generally Tann*, 841 F.2d at 540, 21 BRBS at 10 (CRT); *Turner*, 661 F.2d at 1031, 14 BRBS at 156. In this regard, the Director argues that claimant's reliance on employer's offer that it would seek light-duty employment for claimant at its facility, and claimant's subsequent cooperation with employer's vocational consultant, establishes his diligence in seeking alternate employment after May 6, 1988. We disagree. After employer released claimant on May 6, 1988 because he was not physically able to perform his usual employment, it was required under the Act to establish the availability of suitable alternate employment or to provide claimant with continuing compensation for total disability. *See Turner, supra.* Employer, however, is not obligated under the Act to rehire claimant, *Turner, supra*, 661 F.2d at 1043, 14 BRBS at 165, to find claimant an actual job offer, *Palombo, supra*, 937 F.2d at 74, 25 BRBS at 6 (CRT), or to provide him the opportunity to apply for the actual jobs it contends establish the availability of suitable alternate employment, *see Tann, supra*, 841 F.2d at 543, 21 BRBS at 15 (CRT). Accordingly, employer's statement that it would determine whether a light-duty position was available at its facility, and its subsequent hiring of a vocational consultant to assist claimant in securing alternate employment, do not affect its showing of suitable alternate employment in May 1988 or establish that claimant

exercised diligence in seeking alternate employment. *See generally Palombo, supra*, 937 F.2d at 73-74, 25 BRBS at 6-8 (CRT).

The uncontradicted evidence in this case establishes that although claimant cooperated fully with Mr. DeMark after his referral in September 1988, claimant did not contact potential employers after his release on May 6, 1988, until January 20, 1989, and he successfully secured alternate employment within a month thereafter on February 16, 1989. Tr. at 43, 105. Under these circumstances, claimant has not rebutted employer's showing of suitable alternate employment dating to May 1988. *See Turner, supra*, 661 F.2d at 1043, 14 BRBS at 165. Accordingly, as a matter of law, we hold that employer established the availability of suitable alternate employment in May 1988, and, pursuant to *Rinald, supra*, claimant's award of benefits for permanent partial disability should commence on May 6, 1988, when claimant was released from his employment with employer. The Director's arguments are therefore rejected, and we affirm the administrative law judge's permanent partial disability award commencing May 6, 1988.[1]

The Director next challenges the administrative law judge's award of Section 8(f) relief.[2] The Director argues

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[1] As a result, we affirm the administrative law judge's finding that employer is entitled to offset its overpayment of total disability benefits after May 6, 1988 against its liability for permanent partial disability benefits. 33 U.S.C. § 914(j) (Supp. V 1987).

[2] In the case of permanent partial disability, employer is entitled to Section 8(f) relief if it establishes (1) that claimant has a pre-existing permanent partial disability; (2) that the disability was manifest to employer; and (3) that claimant's ultimate disability is materially and substantially greater due to the combination of the disabilities than it would be due to the work injury alone. *See Sproull v. Stevedoring Services of America*, 25 BRBS 100 (1991); 33 U.S.C. § 908(f)(1).

that employer failed to establish the existence of a serious and lasting pre-existing disability that combined with claimant's work injury to cause a materially and substantially greater degree of permanent disability than the degree of disability caused by the work injury alone. Prior to claimant's October 21, 1984, work injury, claimant sustained lumbar muscle strains in 1965, 1966, and 1977. X-rays taken after the 1966 back injury revealed a sacral arch defect. Additionally, in 1983 claimant sustained a herniated cervical disc from a work-related injury, which required surgery, and which resulted in a 5 percent permanent partial disability. Claimant's October 1984 back injury ruptured the lumbar disc that the 1966 x-rays revealed had the sacral arch defect. The administrative law judge credited the uncontradicted medical opinions of Drs. Harmon, Peach and Bobbitt that claimant's prior back injuries and neck injury are serious and lasting pre-existing permanent partial disabilities that combined with claimant's October 1984 work injury to cause a greater degree of diability than would have resulted from the October 1984 injury alone. He further found that claimant's pre-existing disabilities were manifest to employer from its clinic records, and accordingly awarded employer Section 8(f) relief. *See generally Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 737 F.2d 1295, 16 BRBS 107 (CRT) (4th Cir. 1984).

The Director first challenges the administrative law judge's finding that claimant's three prior back injuries and sacral arch defect constitute a serious and lasting pre-existing permanent partial disability. However, the Director does not challenge the administrative law judge's finding that claimant's prior neck injury also is a pre-existing permanent partial disability for purposes of awarding Section 8(f) relief. Accordingly, we need not address the

Director's argument regarding claimant's pre-existing back condition.

The Director next challenges the administrative law judge's finding that claimant's pre-existing neck impairment combined with the disability caused by claimant's subsequent back injury to cause a greater degree of impairment than that caused by the second injury alone. Specifically, the Director argues that the proper standard for determining whether the contribution element of Section 8(f) is met is whether claimant sustained a greater loss of wage-earning capacity due to the combination of the prior and subsequent injuries than the loss of wage-earning capacity he sustained due to the second injury alone. The Director's argument was addressed and rejected by the Board in *Luccitelli v. General Dynamics Corp.*, 25 BRBS 30 (1991). For the reasons stated in *Luccitelli,* we hold that the administrative law judge properly found that employer established the contribution element based on the medical opinions of record.[3] *See also Sproull v. Stevedoring Services of America,* 25 BRBS 100, 111 (1991). As the Director does not appeal the administrative law judge's finding that claimant's pre-existing neck impairment was manifest to

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[3] Only Dr. Harmon's opinion clearly meets the contribution element. Dr. Harmon stated that claimant's cervical spine condition substantially and materially contributes to his current level of disability, and that the cervical and work injuries and the surgery they necessitated combined to create a greater impairment than would otherwise have occurred. EX 16. Dr. Bobbitt noted that claimant had a five percent impairment from the cervical disc surgery and that claimant's disability is materially increased by the work injury and disc herniation; however, it is the pre-existing injury that must materially increase the resulting disability. EX 8. Dr. Peach, who performed both the cervical and lumbar laminectomies, states only that claimant has an 18 percent whole man impairment as a result of the disc problems and the two previous surgical procedures. EX 10 at 46.

employer, we therefore affirm the administrative law judge's award of Section 8(f) relief.

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

/s/ Betty J. Stage
BETTY J. STAGE, Chief
Administrative Appeals Judge

/s/ Roy P. Smith
ROY P. SMITH
Administrative Appeals Judge

/s/ Sheldon R. Lipson
SHELDON R. LIPSON
Administrative Law Judge

APPENDIX D

[SEAL]

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
Suite 201
55 West Queens Way
Hampton, Virginia 23669
804-722-0571

CASE NO.: 88-LHC-1635
OWCP NO.: 5-53121

IN THE MATTER OF

JACKIE H. HARCUM, CLAIMANT

v.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, EMPLOYER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, PARTY-IN-INTEREST

Appearances:
John H. Klein, Esq.
For the Claimant
James M. Mesnard, Esq.
For the Employer
BEFORE: DANIEL A. SARNO, JR.
Administrative Law Judge

DECISION AND ORDER

This proceeding arises from a claim filed under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. 901 *et seq.* A hearing was held on October 20, 1989.[1]

Stipulations

The Employer and the Claimant entered into the following stipulations:

1. That jurisdiction of the Act over this claim is appropriate;
2. That an employer/employee relationship existed at all pertinent times;
3. That the Claimant sustained an injury arising out of and in the course of employment on October 21, 1984;
4. That the Claimant's average weekly wage on October 21, 1984 was $662.43 per week;
5. That the Claimant reached maximum medical improvement on December 7, 1987;
6. That the Claimant has not worked at the Shipyard since May 5, 1988;[2]
7. That the number of overtime hours worked listed on Claimant's wage and overtime printout (EX E-1, p. 2) reflects the actual number of overtime hours worked. Thus, the Claimant worked 48 hours of overtime in 1988 (Tr. 50-53).
8. That the Claimant's wage-earning capacity adjusted back to the date of injury is $3.80 per hour for 40 hours

[1] The parties filed post-hearing briefs. The Employer filed a response to the Claimant's brief. The response brief was not authorized by the Presiding Judge and will not be considered.

[2] Stipulations 1-6 appear at Tr. 5-8.

per week. Thus, the Claimant's wage-earning capacity is $152.00 per week.[3]

9. That there was a timely claim for compensation, notice of injury and notice of controversion (ALJ 1; Tr. 5, 6).

Issues

1. Is the Claimant entitled to a temporary partial disability award for lost overtime from April 11 through December 7, 1987?
2. Is the Claimant entitled to a temporary total disability award from January 18, 1988 through May 6, 1988?
3. Is the Claimant entitled to a temporary total disability award from May 6, 1988 until February 16, 1989?
4. Is the Employer entitled to relief pursuant to Section 8(f) of the Act?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Jackie H. Harcum

Jackie H. Harcum was 48 years old on the hearing date and resides in Hampton, Virginia. He completed 11th grade and eventually earned his G.E.D. in the Army (Tr. 24, 25; EX 14, p. 6). The Claimant took a pre-employment physical at the Shipyard which he passed; he began working for the Employer in February 1963 with no work restrictions (Tr. 25).

The Claimant worked in the X-43 Machinery Installation Department. He performed such heavy work on ships as lifting 75-100 pounds, frequent bending, working in tight quarters, climbing a lot of steps and ladders, and pushing and pulling (Tr. 25-28).

[3] Stipulation 8 is referred to in the Employer's January 24, 1990 cover letter to its brief. The Claimant refers to this stipulation in his brief at pp. 5-6.

On October 21, 1984, while working on a steam barge, the Claimant sustained a back injury when a 30-40 pound steel plate fell about four feet and struck his back while he was leaning over (Tr. 29, 30). He went to the Shipyard clinic and was referred to Dr. Peach. Dr. Peach had treated the Claimant in the past and had also performed an operation on the Claimant's neck. As a result of the October 21, 1984 injury, Dr. Peach performed two operations on the Claimant's back (Tr. 30).

The Claimant testified that prior to his injury, overtime work was available on a regular basis on the weekends in the X-43 Department. The claimant believed that of the approximately 800 hours per year of overtime offered, he took advantage of about half that amount. The Claimant maintained it was difficult to work 16 hours of overtime every weekend (Tr. 31, 33, 46, 47). The Claimant's overtime record clearly corroborates the Claimant's testimony that prior to his 1984 injury he averaged in excess of 400 hours overtime from 1977 through October 21, 1984 (CX 3, p. 2). The overtime record shows he worked the following amounts of overtime:[4]

1977—423.1 hours
1978—450.2 hours
1979—356.5 hours
1980—376 hours
1981—443.7 hours
1982—460.5 hours
1983—459.9 hours
1984—406.0 hours

Prior to his 1984 injury, the Claimant worked on a crew supervised by Mr. Wainwright. The Claimant identified a

[4] The Claimant averaged 421.9 hours of overtime during this approximate 8-year period.

co-worker on that crew as "Scobie" Watson. The Claimant testified that he believes that individual has since retired (Tr. 44-47). Shipyard records reflect that a Mr. Watson did accrue overtime from 1979 through 1988 (CX 3, p. 1).

The Claimant eventually returned to work with restrictions. There was no work available within his restrictions in the regular X-43 Department. Consequently, the Claimant was assigned to the MRA Shop with other workers with work restrictions (Tr. 32). He worked in the MRA Shop from April 11, 1987 through December 7, 1987 (Tr. 32). While in the MRA Shop, the Claimant worked only 40 hours per week. Overtime was not available to MRA Shop employees (Tr. 32, 33).

Mr. Harcum testified that while he was in the MRA Shop, the X-43 Department continued to have overtime available on a regular basis. Indeed, the Claimant noted that in his 25-year experience as an X-43 Department employee, overtime was regularly available in that department. He recalled that while working in the MRA Shop, he would see members of Mr. Wainwright's crew about twice a week and would ask about overtime. They indicated to him that overtime was available almost every weekend (Tr. 45, 46). Yet, during his prior deposition, the Claimant had stated he did not know how he was aware that overtime was available to Wainwright's crew while he was working in the MRA Shop (EX 14, p. 14).[5] The Claimant further stated that had he not been working with restrictions in the MRA Shop, he would have taken ad-

[5] I find that the deposition testimony does not affect the credibility of the Claimant's hearing testimony. I find the Claimant's testimony in regard to his own overtime as well as that of other workers in X-43 Department to be forthright and credible. Even the Shipyard records introduced at hearing corroborate the Claimant's testimony that overtime was available to workers in the X-43 Department from 1977 through 1989 (CX 2, 3; EX 18).

vantage of overtime with his old crew under Mr. Wainwright (Tr. 33, 34).

On January 18, 1988, the Claimant returned to the X-43 Department. He was moved from the MRA Shop and assigned work aboard an aircraft carrier. He was still under Dr. Peach's care and still under work restrictions from Dr. Peach (Tr. 34). To get to his work station, the Claimant was required to climb two flights of stairs to get on the aircraft carrier. Then he had to descend 5 steeper flights of permanent shipboard steps to the work level. He described the 5 flights onboard the ship as "a ladder with handrails". (Tr. 34, 35, 47-49; EX 14, pp. 18, 19). He was required to climb these flights numerous times during his work day (Tr. 49; EX 14, p. 17). The Claimant maintained that this daily climbing irritated is back "real bad" and caused pain which ran down his legs. He averred that he barely got through each work day because of the pain caused by climbing (Tr. 35, 53, 54). The Claimant agreed that during the time he worked on the aircraft carrier, from January until May 6, 1988, he did work 48 hours of overtime. This constituted about three weekends of overtime (Tr. 50-55). However, the Claimant maintained that other members of his crew worked more overtime than he did and overtime was made available every weekend to his crew (Tr. 62).

The Claimant maintained that this work was about as physically strenuous as his pre-injury work in X-43 Department (Tr. 34). He complained to Mr. Payne, his supervisor. Mr. Payne sent him to Dr. Bobbitt at the Shipyard clinic. Dr. Bobbitt, in turn, sent him to Dr. Peach. Dr. Peach gave the Claimant a letter for the clinic. The letter addressed the Claimant's climbing restriction.[6] (Tr. 35, 56, 50). Notwithstanding the letter, the Shipyard made no

[6] Dr. Peach's letter is dated March 22, 1988 (EX 10, pp. 49, 50).

changes in the nature of the Claimant's work. He continued to complain until he was "passed out" on May 6, 1988 (Tr. 36, 37).

The Claimant testified that although he later filed a claim for benefits over this matter, he did not specifically file a grievance through his union concerning the alleged work restriction violation (Tr. 53). He did not get along with the union. At an earlier deposition, the Claimant maintained that he has filed a union grievance over this matter; however, he never heard anything about it being resolved (EX 14, p. 20).

When the Claimant was "passed out" on May 6, 1988, he began collecting temporary disability payments of $442.62 per week. He was told that the Shipyard would look for another job for the Claimant in the Shipyard (Tr. 38, 57, 58). He did not begin to look for another job outside the Shipyard at that time because he was still on the company roles and might still return to another job (Tr. 57, 58). The Claimant next heard from the Shipyard in August, 1988. He received a letter from Mr. Decker setting up a meeting in the Personnel Department. At that meeting, Mr. Decker told the Claimant that the Shipyard could find no other jobs for the Claimant within his restrictions. The Claimant's employment would be terminated after 30 months. He was also told that he was being referred to Mr. DeMark, a rehabilitation counselor (Tr. 30-40).

The Claimant later met with Mr. DeMark who gave him some tests (Tr. 40). Eventually, Mr. DeMark prepared the Claimant's resume. Then, when Mr. DeMark suggested he seek employment, the Claimant complied (Tr. 40, 41, 58). The Claimant began to check out his own leads as well as those suggested by Mr. DeMark about January 1, 1989 (Tr. 41, 61). He went to every job suggested by Mr.

DeMark (Tr. 41). He finally got a job offer from Hampton Sheet Metal to start on February 16, 1989. The job started at $4.00 per hour and now pays $5.00 per hour. He is now a tool room clerk and the work is within his physical abilities. Mr. DeMark spoke to the employer prior to the job offer (Tr. 42-44).

George Decker

George Decker is the Supervisor of Employee Relations for the X-43 Machinery Installation Department and the X-44 Insulation Department (Tr. 63, 64). He is responsible for administering the labor agreement and maintaining employment records of both hourly and salaried employees.

Mr. Decker stated that under the collective bargaining agreement, every attempt is made to divide overtime equally in each pay rate classification (Tr. 67, 68, 78, 79). He identified a Mr. Kaufman as one employee in the same pay rate classification as the Claimant while the Claimant was working on the aircraft carrier from January 1988 until May 6, 1988 (Tr. 68, 69).[7] Mr. Decker also identified Messrs. Hopson, Conner and Holmes as three individuals with the same seniority as the Claimant.[8]

Mr. Decker agreed that from May to August, 1988, the Shipyard conducted a job search within the Shipyard for the Claimant. Had that seach been successful, the Claimant would have been put to work elsewhere in the Shipyard (Tr. 74, 75). He further acknowledged that he did not contact the Claimant during the time that the job search was ongoing (Tr. 75). The job search proved to be unsuccessful

[7] Mr. Kaufman's overtime hours from 1977 to 1989 are listed at EX 18.

[8] Their respective overtime hours from 1977 to 1989 appear at CX 2a-c.

in August 1988. The clinic notified Mr. Decker (Tr. 74). Mr. Decker met with the Claimant on August 24, 1988 and told him of the job search results. He further told the Claimant that he would be placed on an inactive status for 30 months, after which the employment relationship would end (Tr. 70). Mr. Decker further testified that the effective date of transferring the Claimant to the inactive roll was then made retroactive to May 6, 1988 (Tr. 75, 76).

Mr. Decker equivocated whether the Claimant's verbal complaints to his supervisor about his job exceeding his work restrictions could be interpreted as sufficient to comply with initiating the first step requirement for a grievance (Tr. 76, 77). A union representative need not be present to initiate a complaint (Tr. 77). However, to go any farther along in the grievance procedre requires union involvement (Tr. 78).

Francis DeMark

Francis DeMark is a Certified Rehabilitation Counselor (Tr. 83, 84). The Claimant was referred to him by the Shipyard. Mr. DeMark and the Claimant had their first meeting on September 20, 1988 (Tr. 84, 85). During the first meeting, the Claimant appeared to be quite anxious at the prospect of a career change after more than 20 years at the Shipyard. The Claimant indicated that he desired to return to the Shipyard and Mr. DeMark agreed to check out the possibility (Tr. 101-103).[9] At this first meeting, the Claimant was not presented with any job leads (Tr. 99). Then, over the next few months, Mr. DeMark developed a job placement and rehabilitation program for the Claimant. He obtained the Claimant's medical records concern-

[9] Mr. DeMark's later conversation with Dr. Harmon on November 29, 1988, made it fairly clear that the Claimant could not return to the Shipyard (Tr. 103).

ing work restrictions from Dr. Peach on October 5, 1988 (Tr. 85, 86). He counseled the Claimant extensively concerning his rehabilitation program and job interviewing skills (Tr. 85). At Mr. DeMark's suggestion, the Claimant obtained a chauffeur's license (Tr. 89). The Claimant was administered a battery of vocational tests on November 1, 1988 (Tr. 104). A resume was completed for the Claimant on January 20, 1989 (Tr. 109). That same day was the first day that Mr. DeMark and the Claimant "really sat down with the newspaper and looked at job listings and started talking about actually applying for jobs." (Tr. 105). That was the date when the Claimant began looking for jobs on a full time basis. (Tr. 105, 106).

Mr. DeMark agreed that the Claimant was extremely cooperative throughout the whole process. He did everything asked of him within a reasonable time (Tr. 98). Mr. DeMark also agreed that the Claimant was relying upon him to find a job (Tr. 99). Mr. DeMark also believes that he did provide Claimant the confidence to present himself in a positive manner to potential employers (Tr. 113). The Claimant responded well to all counselling efforts and by January 25, 1989, he had applied for jobs (Tr. 106).

On February 14, 1989, Mr. DeMark saw a newspaper ad for a tool room clerk position at Hampton Sheet Metal. He personally took a copy of the Claimant's resume and drivers license to the prospective employer. He gave the company a profile of the Claimant's work restrictions and vocational situation. Mr. DeMark immediately set up an interview for the Claimant at the company on the following day. After setting up the interview, Mr. DeMark met with the Claimant. The following day, the Claimant had an interview and was immediately offered a job starting at $4.00 per hour. Mr. DeMark agreed that he had recommended that the Shipyard offer to pay for on-the-job training as an incentive for a prospective employer to hire

the Claimant. An on-the-job training program was implemented at Hampton Sheet Metal and the Claimant completed it successfully. His present pay is $5.00 per hour (Tr. 89-91). The Hampton Sheet Metal job offer was the first job offer which the Claimant received (Tr. 107).

Subsequent to the Claimant's employment by Hampton Sheet Metal, the Shipyard, through counsel, requested that Mr. DeMark conduct a labor market survey of available jobs for which the Claimant may have qualified from May 6, 1988 to February 15, 1989 (Tr. 93). After receiving input from Dr. Peach concerning the Claimant's restrictions (EX 20), Mr. DeMark centered his attentions on such approved restrictions as dispatcher, service station attendant and motel/hotel desk clerk (Tr. 94). Mr. DeMark listed eleven job possibilities which were available during that time period and for which the Claimant was qualified (EX 19). Counsel for the Claimant did not contest the existence of those jobs as described in Mr. DeMark's report (Tr. 95). Mr. DeMark found no reason why the Claimant could not have sought employment during that time period (Tr. 89, 90). Mr. DeMark estimated that the Claimant's wage earning capacity from May 6, 1988 to February 16, 1989 was $4.00 per hour (Tr. 95, 96). Mr. DeMark agreed that he never brought any of these jobs to the attention of the Claimant. Nor was Mr. DeMark aware of these jobs while he was working with the Claimant (Tr. 109).

MEDICAL EVIDENCE

The Shipyard clinic records document several back injuries. The Claimant sustained a lumbar muscle strain on June 3, 1965 and a lumbo-sacral strain on February 8, 1966 (EX 7, p. 2). The 1965 injury was treated with Darvon by the clinic (EX 7, p. 18). The 1966 injury was located

in the Claimant's spine at L5-S1, 1 and x-rays revealed a sacral arch defect (EX 7, pp. 16, 18).

The Claimant's next back injury occurred on February 7, 1977 while lifting a pump. He was diagnosed as having sustained a lumbar strain; he was placed on work restrictions and was "passed out" from February 27, 1977 through March 28, 1977 (EX 7, p. 9). The Claimant continued to be treated for about 9 months for his back (EX 7, pp. 20-21).

The Claimant sustained left shoulder injuries on February 27, 1981 and December 13, 1983 (EX 7, pp. 11-12). The 1983 injury was originally treated by Dr. Prillaman, an orthopedist (EX 7, p. 14). By January, 1984, the Claimant's condition had not improved. Dr. Prillaman referred the Claimant to Dr. Peach, a neurosurgeon (EX 9).

Dr. Peach examined the Claimant on January 19, 1984 and admitted the Claimant to Riverside Hospital for a cervical myelogram. The myelogram was performed, and it revealed a herniated cervical disc at C6-C7 (EX 10, pp. 1-4). Dr. Peach performed a hemilaminectomy to remove the herniateddisc on January 27, 1984 (EX 10, p. 6), and the Claimant was discharged from the hospital on February 4, 1984 (EX 10, p. 8).

The Claimant progressed well after he was released from the hospital, and Dr. Peach returned him to work on March 5, 1984 (EX 10, pp. 9-10). The Claimant was totally disabled from January 4, 1984 through March 4, 1984, and he was voluntarily paid temporary total disability for this period (EX 15, pp. 2-3).[10]

On October 21, 1984, the Claimant was working inside a bilge on a steam barge when someone knocked over a piece of grating, and it struck the Claimant in the low

[10] The Claimant's interrogatory answers indicate that he still experiences "stinging" in his neck (EX 13, p. 2).

back. The Claimant was diagnosed as having sustained a lumbar contusion (EX 7, p. 13). His symptoms continued (EX 7, pp. 24-25), and on November 26, 1984, the Claimant selected Dr. Peach to treat this injury (EX 7, p. 15).

Dr. Peach examined the Claimant on November 28, 1984, and Dr. Peach suspected that the Claimant might have a herniated lumbar disc (EX 10, pp. 11-13). A lumbar myelogram was performed on December 31, 1984, but it was negative (EX 10, p. 15). A CT scan, however, indicated a bulging or herniated disc at L5-S1 (EX 10, p. 16).[11] When an injection of lumbar steroids did not alleviate the Claimant's complaints, Dr. Peach performed a hemilaminectomy at L5-S1 (EX 10, pp. 18-20).

The Claimant was discharged from the hospital on January 17, 1985, but he did not progress as hoped. Another CT scan and more x-rays were performed in March 1985, and these tests suggested problems at the site of the recent surgery (EX 10, pp. 22-24). On March 15, 1985, Dr. Peach surgically explored the site of the earlier surgery, and removed some scar tissue. Dr. Peach also freed the nerve root from an adhesion (EX 10, p. 26). The Claimant was discharged from Riverside Hospital on March 20, 1985 (EX 10, p. 27), but his course of recovery was protracted (EX 10, pp. 28-29).

Dr. Peach examined the Claimant on July 2, 1985, and the doctor's notes reflect his opinion that the Claimant had progressed to a point where he could return to work on some type of restricted duty (EX 10, p. 31). The Claimant underwent another injection of lumbar epidural steroids on August 2, 1985 (EX 10, p. 32). Dr. Peach wrote the Employer's clinic on September 17, 1985, and stated that the Claimant looked healthy, but he told Dr. Peach that

[11] This is the same level at which a sacral arch defect was noted in 1966 (EX 7, pp. 16, 18).

he was not much better. Dr. Peach explained to the Claimant that he would not be absolutely pain free, but the doctor also felt that Claimant should return to light duty work (EX 10, p. 34).

The Claimant returned to light duty on October 4, 1985 (EX 2, p. 3; EX 7, pp. 29, 57), but he immediately went to the clinic complaining of pain, and he was passed back out. The Employer's clinic sent the Claimant to Dr. K. Singh Sahni at the Medical College of Virginia (MCV) for an evaluation because of his complaints (EX 7, pp. 79-80), but other than continued conservative treatment, Dr. Sahni had no suggestions for further treatment (EX 11).

Dr. Peach wrote Dr. Bobbitt on December 19, 1985 and expressed some frustration with the Claimant's continued complaints of great pain, when Dr. Peach could find no objective evidence of that degree of symptomology (EX 10, pp. 35-36). The Claimant returned to light duty work again in January 1986 (EX 2, p. 4), and he was assigned to the Shipyard's MRA shop (EX 7, p. 59).

During the remainder of 1986, the Claimant worked under light duty restrictions (EX 2, p. 4; EX 7, pp. 59-66). He was also treated sporadically by Dr. Peach (EX 10, p. 37). In January 1987, the Claimant complained of leg pain, and a facet block injection was performed on January 28, 1987 at Riverside Hospital (EX 10, pp. 40-42). The injection caused some temporary relief, but the Claimant still had pain in his low back (EX 10, p. 44), and he continued to work under restrictions (EX 7, pp. 66-70).

Dr. Peach determined that the Claimant had reached maximum medical improvement on November 4, 1987, and on that date the doctor imposed permanent restrictions of lifting no more than thirty pounds on a repetitive basis, and that the Claimant should work in an area where he could alternate between sitting and standing. It was also noted that the Claimant should be able to stretch from

time to time. Finally, Dr. Peach restricted the Claimant to no climbing of vertical ladders. However, Dr. Peach saw no reason why the Claimant could not climb steps (EX 10, p. 45). The Employer's clinic instituted the restrictions as ordered by Dr. Peach (EX 7, p. 71). On December 1, 1987, Dr. Peach advised the clinic that the Claimant had a permanent 18% whole body impairment based on the AMA Guides (EX 10, p. 46).

The Claimant had been assigned to the MRA Shop during his convalescence, but when his restrictions became permanent, he was returned to his department at the Shipyard (EX 7, p. 83). The Claimant was assigned work within his restrictions (EX 7, p. 72), but he continued to complain of pain (EX 7, p. 45).

In a January 11, 1988 note, Dr. Peach requested that the Claimant avoid either ladders or steep steps (EX 10, p. 47). Dr. Peach further stated, "If any work could be found off the ship, I see no reason why he could not continue to work full time." On January 11, 1988, the clinic acknowledged Dr. Peach's request for non-shipboard work (EX 7, p. 45). On January 18, 1988, the Claimant complained to Dr. Bobbitt of back pain caused by the shipboard climbing; however, Dr. Bobbitt told the Claimant that if he wanted his restrictions changed, he had to see Dr. Peach (EX 7, p. 46). The Claimant did so on that very date. Dr. Peach's January 18, 1988 treatment note which was sent to the Shipyard clinic restated the doctor's opinion that the Claimant should work in a non-shipboard shop setting. Moreover, Dr. Peach specifically stated, "I still strongly feel that he should not be climbing ladders or steep steps aboard ship" (EX 7, p. 48).

After the Claimant complained to the U.S. Department of Labor that he was being worked outside his restrictions, Dr. Bobbitt contacted Dr. Peach and requested clarification of the term "steep stairs" used in Dr. Peach's January

11, 1988 note. This was done on March 4, 1988 (EX 7, p. 85). Dr. Bobbitt did not reference Dr. Peach's January 18, 1988 note and explanation.

Dr. Peach's March 22, 1988 letter states unequivocally:

> When I referred to the steep steps, I was referring to the usual type of steps aboard ship that are usually greater than 60 degrees in incline, fairly typical of what I am familiar with from when I worked on aircraft carriers at the Shipyard.
>
> I just feel that since the patient is required to climb two flights to get aboard the carrier, go down, and then back up another five flights to and from the area in which he is working that this is somewhat stressful on someone with a chronic problem like Mr. Harcum. I guess the ideal environment would be if he could continue to work in the machine shop where he was moving a little more, where he could constantly turn, sit briefly, lean, etc., rather than have to be in the forward flexed position for long periods of time. I have explained to Mr. Harcum that this situation may not be obtainable, in which case his choices are to put up with his discomfort or to quit the job and find another job. Mr. Harcum does not want to quit the job and find another job. Mr. Harcum does not want to quit his job, so I suggested that he talk with his supervisor to see if any other work is available in a shop setting.
>
> His most recent exacerbation of discomfort I feel could best be treated with an epidural block, and we will carry this out.

Dr. Hamill performed a lumbar epidural steroid injection on March 31, 1988 (EX 10, p. 51). On May 3, 1988,

the Shipyard clinic changed the Claimant's permanent restrictions to the following (EX 7, pp. 73, 74):

> No lifting over 30 lbs. Should work in area that allows frequent change of position. No ladder climbing. Limited stair climbing. Recommend no more than 2 flights 4 times a day.

There was no work available within these restrictions in the Claimant's home department and he was passed out (EX 10, p. 74). A search of other departments in the Shipyard was conducted, and the Employer's personnel office had the Claimant fill out a transfer application in case permanent light duty work was located elsewhere, but none was found (EX 7, pp. 87-90).

Dr. Harmon reviewed the Claimant's Shipyard clinic record and his outside clinic records.[12] He noted that following the Claimant's employment at the Shipyard, the Claimant sustained a series of back injuries beginning in 1965. Dr. Harmon opined that the low back injuries sustained in the 1960's and 1970's, as well as the sacral arch defect detected in a 1966 x-ray, constitute a pre-existing permanent partial disability. These injuries permanently weakened the Claimant's low back, and made him more susceptible to injury with a more severe resulting disability. Second, Dr. Harmon opined that according to the AMA Guides, the Claimant's 1984 cervical spine caused a 5% permanent partial disability. Dr. Harmon went on to say:

> It is obvious that Mr. Harcum's current low back condition was not caused by any one injury. Rather, it is clear that Mr. Harcum's current low back condition is the result of cumulative and repeated lumbar injuries. Each injury aggravated Mr. Harcum's low back prob-

[12] Dr. Harmon's report is dated March 15, 1989 (EX 16).

lems and made him more susceptible to further back injuries, and each injury increased the severity of the subsequent injuries. This clearly constitutes a pre-existing permanent partial disability, and a cautious employer would not have hired Mr. Harcum with this manifest condition.

Additionally, Mr. Harcum's cervical spine condition also substantially contributes to his current level of disability. As a result of shoulder injuries in 1981 and 1983, surgery was performed on Mr. Harcum's cervical spine. As I noted previously, this equates to a five percent (5%) whole body impairment. I agree with Dr. Peach's statement in his December 1, 1987 letter. Dr. Peach indicated that Mr. Harcum's level of whole body impairment is a result of two surgical procedures: the 1984 surgery on Mr. Harcum's cervical spine and the 1985 surgery on his lumbar spine. The cervical and lumbar injuries, and the surgery they necessitated, clearly combined to create a greater impairment than would otherwise have occurred. This condition was manifest in Mr. Harcum's clinic record, and a cautious employer would not have hired him with this condition.

Dr. Peach's December 1, 1987 letter indicates his opinion that the Claimant's permanent partial disability is due in part to both surgical procedures which involved the Claimant's cervical and lumbar spinal areas (EX 10, p. 46).

Dr. Bobbitt also reviewed the medical records and submitted an opinion dated November 18, 1988 (EX 8, pp. 3, 4, 5). From this review of the records as well as his knowledge of the Claimant, Dr. Bobbitt opined: "It is clear that Mr. Harcum had a pre-existing partial impairment or disability that was materially increased by the second injury and disc herniation."

Is the Claimant entitled to a temporary partial disability award for lost overtime from April 11, through December 7, 1987?

It is clear from the Claimant's testimony as well as the Company records of his overtime work in the X-43 Department that prior to his October 21, 1984 injury, overtime work was available to the Claimant and he took advantage of a considerable amount of that overtime. I find his testimony quite credible that he took advantage of about half of the estimated 800 overtime hours offered on an annual basis. He averaged in excess of 400 hours of overtime work available from 1977 until his injury in 1984. It is also clear that while the Claimant was working on restriction in the MRA Shop from April 11, 1987 through December 7, 1987, no overtime work was available to MRA Shop employees. Had such overtime work been available, the Claimant would have worked overtime. Yet, during that same time, overtime was still available on a regular basis in the X-43 Department to members of his old crew under Mr. Wainwright's supervision.

The Claimant need only show that absent his injury, he would have worked available overtime. I find that the evidence of record is sufficient to demonstrate a loss of overtime which resulted in a loss of wage-earning capacity during the time he worked in the MRA Shop which entitles him to temporary partial disability compensation. *See Brown v. Newport News Shipbuilding*, BRB No. 87-957 (November 27, 1989).[13]

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[13] The Claimant was previously paid compensation for loss of overtime on a voluntary basis by the Employer for loss of overtime at the rate of $87.83 per week (ALJ 1, pp. 5-6). This same rate is to be applied to the period from April 11, 1987 through December 7, 1987.

Is the Claimant entitled to a temporary total disability award from May 6, 1988 until February 16, 1989?

The parties agree that at the present time, the Claimant has a wage-earning capacity of $152.00 per week. This is based upon the fact that the Claimant has been working at Hampton Sheet Metal since February 16, 1989 in a job within his medical restrictions.[14] The parties have also stipulated that the Claimant reached maximum medical improvement (MMI) on December 7, 1987. Both parties further agree that since being "passed out" on May 6, 1988 from the Shipyard, the Claimant received temporary total disability payments in the amount of $441.62 per week. The Employer, relying upon *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157-159 (1989) maintains that, as a matter of law, the Claimant's now established residual wage earning capacity relates back to the date of maximum medical improvement. Moreover, the Employer maintains that even if the residual wage earning capacity did not relate back as a matter of law, the Employer has established the availability of suitable alternate jobs which the Claimant was capable of performing from May 6, 1988 until February 16, 1989. The Claimant, however, maintains that the Claimant should not now be penalized for holding off until February, 1989 before seeking and finding work. The Claimant avers that the Employer's promise to attempt to find him another job at the Shipyard caused him to delay his search. Moreover, he believes that his reliance upon and complete cooperation with Mr. DeMark's vocational rehabilitation efforts indicates his willingness to ultimately obtain a job.

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[14] The parties do not contest that from February 16, 1989 to the present and continuing, the Claimant is entitled to receive $340.28 per week as an award for permanent partial disability.

Based upon the specific facts of this case as discussed above, the Claimant may well have delayed his job search in reliance upon either the Shipyard or Mr. DeMark. However, that is simply not determinative of this issue. The Employer's argument is compelling on this issue. The subsequent employment of the Claimant absolutely settled any question of suitable alternate employment. This done, the date of permanency is the date of onset of permanent partial disability. *See Stevens, supra.* Therefore, I find that the Employer is entitled to a credit of $101.34 per week from May 6, 1988 to February 16, 1989.

Is the Claimant entitled to a temporary total disability award from January 18, 1988 through May 6, 1988?[15]

The record is clear that no sooner had the Claimant returned to work in the X-43 Department aboard the aircraft carrier on January 18, 1988, he started complaining that the daily climbing was too strenuous and violated his work restrictions. In his January 11, 1988 letter, Dr. Peach had advised against shipboard work as well as climbing ladders and steep steps. On January 18, 1988, Dr. Peach's note to the Shipyard reaffirmed this and referred specifically to steep steps aboard ship. The Claimant's continued complaints bore no further fruit until he complained to the U.S. Department of Labor. On March 4, 1988, Dr. Bobbitt finally asked for clarification from Dr. Peach about the term "steep steps". No mention was made of Dr. Peach's clarification in his January 18, 1988 note. In late

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[15] Based upon my conclusions on the previous issue, I find that since the Employer has established suitable alternate employment and the date of permanency (December 7, 1987) is the date of onset of permanent partial disability, the present issue can no longer be one of total disability since the Claimant retained some wage-earning capacity during this time period.

March Dr. Peach then clearly and unequivocally reaffirmed that steep stairs referred to the type found aboard ships. It was not until May 6, 1988, that the Claimant's duties no longer required shipboard work involving steep stair climbing. Based upon the Claimant's testimony as well as the Shipyard records and reports of Dr. Peach, I find that the Shipyard did violate the Claimant's medical restrictions and was put on notice of this fact by both the Claimant and Dr. Peach on January 18, 1988.

The Claimant maintains that notwithstanding the fact that the Claimant was working during this period, he is entitled to disability compensation. *Haughton Elevator Company v. Lewis*, 572 F.2d 447 (4th Cir. 1978). The Employer maintains that this case is inapposite since it has not been shown that the Claimant worked in excruciating pain. Moreover, the Claimant had worked 48 hours of overtime during the period. Furthermore, the Employer maintains the Claimant could have resolved the question by filing a grievance; yet he chose not to do so.

I find the most compelling evidence concerning the question of whether or not the Claimant was required to work in extreme pain, to be the testimony of the Claimant himself. I find him to be an extremely credible witness. He testified that the continuous shipboard climbing was very difficult on him and that he barely got through the work day because of it. I believe his testimony. The fact that he worked 48 hours of overtime during that period is inconsequential. He had a long history of working a lot of overtime in the past when it was available. He worked as much overtime s he could get because he needed the money (Tr. 31). This was the first time overtime was available to him in a number of years. This limited amount of overtime suggests to me an attempt by an individual to persevere through adversity. I will draw no negative inference because the Claimant worked some overtime during this time frame.

The Employer maintains that the Claimant's testimony is not credible because he could have resolved the matter by simply filing a grievance. Moreover, the Employer points out inconsistencies in the Claimant's testimony concerning whether or not a grievance was filed. I do not find that this in any way affects the credibility of the Claimant. Whether or not the Claimant chose to file a grievance in his concern. There was no requirement for him to do this. Apparently he did not get along well with his union. Nor do I find his testimony inconsistent about whether a grievance was actually initiated or not. Even Mr. Decker had a problem establishing precisely what specifically constituted the first step of filing a grievance. I'm certainly not going to discredit the Claimant's testimony because he may have only a layman's knowledge concerning the subtleties of a bargaining agreement.

Consequently, I find that the Claimant's testimony concerning the extent of his pain during the time he was worked in violation of his medical restrictions to be probative. While Dr. Peach did not specifically indicate that the Claimant was in excruciating pain during this time period, his reports do reflect the doctor's concern for the Claimant's ongoing chronic discomfort and pain caused by the shipboard climbing. Therefore, I find that Dr. Peach's reports support the Claimant's testimony rather than detract from it. Accordingly, I find that the Claimant has established entitlement to partial disability compensation notwithstanding the fact that he was working during this time period. *Haughton, supra.* The Claimant is entitled to permanent partial disability compensation of $340.28 per week from January 18, 1988 through May 6, 1988.

Is the Employer entitled to Section 8(f) relief?

Turning attention first to the requirement that the Employer demonstrate that the Employee had a pre-existing permanent, partial disability, it should be noted that this

need nc. be an economic disability, but a physical disability sufficiently serious to motivate an employer to discharge the employee due to an increased risk of an employment-related accident and increased compensation liability. *Atlantic and Gulf Stevedores, Inc. v. Director, OWCP,* 541 F.2d 602 (1976). Also, the pre-existing disability need not be employment related. However, the mere fact that the employee has suffered a prior injury does not in and of itself establish a pre-existing disability. There must be some serious lasting physical problems resulting from the injury. *Director, OWCP v. Belcher Erectors,* 770 F.2d 1220 (1985). After considering the medical evidence of record, I find that it is clear that the Claimant suffered a series of back and neck injuries beginning in 1965. The opinions of Drs. Harmon, Peach and Bobbitt leave no doubt that they believe that prior to Claimant's 1984 lumbar injury, he suffered from a pre-existing permanent partial disability. This was brought about by the Claimant's low back injuries sustained in the 1960's and 1970's, the sacral arch defect detected in 1966, and the 1984 cervical surgery. These are well reasoned decisions. Moreover, the Claimant's testimony concerning ongoing lower back and neck problems corroborates their opinions. The record is devoid of contrary probative evidence. Therefore, I find that the Employer has demonstrated that the Claimant suffered a serious pre-existing permanent partial disability.

The next question is whether the Claimant's pre-existing disability combined with his last injury and, thus, caused a greater degree of disability than that which would have resulted solely from the final injury. Again, the opinions of Drs. Harmon, Peach and Bobbitt support this proposition. Sincer there is no contrary probative evidence, I find that the Employer has met its burden of proof in establishing that the Claimant's pre-existing disability combined

with his last injury and caused a greater degree of disability than that which would have resulted solely from the final injury.

Finally, the Employer must establish that the Claimant's pre-existing disability was manifest to it. A pre-existing impairment is manifest to the Employer if the Employer knew or could have discovered the impairment prior to the most present injury. *Lowry v. Willamette Iron and Steel Co.,* 11 BRBS 372 (1979). The mere existence of records showing the impairment is sufficient. I find that the Shipyard clinic records clearly reflect the Claimant's ongoing back and neck problems form 1965 on. These conditions were clearly manifest to the Employer. I find that the Employer has established that the Claimant's pre-existing disability was manifest to it.

Therefore, the Claimant's disability is within the scope of Section 8(f) of the Act. The Employer is entitled to relief pursuant to that Section.

ORDER

1. The Employer is to pay the Claimant compensation for temporary partial disability for lost overtime at the rate of $87.83 per week from April 11, 1987 through December 7, 1987.

2. The Employer is to pay the Claimant compensation for temporary partial disability at the rate of $340.28 per week from January 18, 1988 until May 6, 1988.

3. The Employer is to pay the Claimant compensation for permanent partial disability at the rate of $340.28 per week from May 6, 1988 to the present and continuing.[16]

4. The Employer is to receive a credit from the Claimant of $101.34 per week from May 6, 1988 to February 16, 1989.

---

[16] It is noted that the Employer has already complied with this.

5. Upon the expiration of 104 weeks beginning May 6, 1988, the Special Fund shall be liable for continuing payments at the same weekly rate.[17]

/s/ Daniel A. Sarno, Jr.
DANIEL A. SARNO, JR.
Administrative Law Judge

DAS/jbm

Dated: March 28, 1990
Hampton, Virginia

[17] The Special Fund will not be penalized for the Employer's violation of the Claimant's medical restrictions from January 18, 1988 to May 6, 1988.

APPENDIX E

STATUTORY AND REGULATORY PROVISIONS

The Longshore and Harbor Workers' Compensation Act, as codified at 33 U.S.C. 901 *et seq.*, provides in relevant part:

§ 921. Review of compensation orders

* * * * *

(b) Benefits Review Board; establishment; members; chairman; quorum; voting; questions reviewable; record; conclusiveness of findings; stay of payments; remand

(1) There is hereby established a Benefits Review Board which shall be composed of five members appointed by the Secretary from among individuals who are especially qualified to serve on such Board. The Secretary shall designate one of the members of the Board to serve as chairman. The Chairman shall have the authority, as delegated by the Secretary, to exercise all administrative functions necessary to operate the Board.

(2) For the purpose of carrying out its functions under this chapter, three members of the Board shall constitute a quorum and official action can be taken only on the affirmative vote of at least three members.

(3) The Board shall be authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under this chapter and the extensions thereof. The Board's orders shall be based upon the hearing record. The findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the Board. No stay shall be issued

unless irreparable injury would otherwise ensue to the employer or carrier.

(4) The Board may, on its own motion or at the request of the Secretary, remand a case to the administrative law judge for further appropriate action. The consent of the parties in interest shall not be a prerequisite to a remand by the Board.

* * * * *

(c) Court of appeals; jurisdiction; persons entitled to review; petition; record; determination and enforcement; service of process; stay of payments

Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred, by filing in such court within sixty days following the issuance of such Board order a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court, to the Board, and to the other parties, and thereupon the Board shall file in the court the record in the proceedings as provided in section 2112 of Title 28. Upon such filing, the court shall have jurisdiction of the proceeding and shall have the power to give a decree affirming, modifying, or setting aside, in whole or in part, the order of the Board and enforcing same to the extent that such order is affirmed or modified. The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the court. No stay shall be issued unless irreparable injury would otherwise ensue to the employer or carrier. The order of the court allowing any stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference

thereto, that irreparable damage would result to the employer, and specifying the nature of the damage.

(d) District court; jurisdiction; enforcement of orders; application of beneficiaries of awards or deputy commissioner; process for compliance with orders

If any employer or his officers or agents fails to comply with a compensation order making an award, that has become final, any beneficiary of such award or the deputy commissioner making the order, may apply for the enforcement of the order to the Federal district court for the judicial district in which the injury occurred (or to the United States District Court for the District of Columbia if the injury occurred in the District). If the court determines that the order was made and served in accordance with law, and that such employer or his officers or agents have failed to comply therewith, the court shall enforce obedience to the order by writ of injunction or by other proper process, mandatory or otherwise, to enjoin upon such person and his officers and agents compliance with the order.

* * * * *

§ 921a. Appearance of attorneys for Secretary, deputy commissioner, or Board

Attorneys appointed by the Secretary shall represent the Secretary, the deputy commissioner, or the Board in any court proceedings under section 921 of this title or other provisions of this chapter except for proceedings in the Supreme Court of the United States.

* * * * *

§ 939. Administration by Secretary

(a) Prescribing rules and regulations; appointing and fixing compensation of employees; making expenditures

Except as otherwise specifically provided, the Secretary

shall administer the provisions of this chapter, and for such purpose the Secretary is authorized (1) to make such rules and regulations; (2) to appoint and fix the compensation of such temporary technical assistants and medical advisers, and, subject to the provisions of the civil service laws, to appoint, and, in accordance with chapter 51 and subchapter III of chapter 53 of Title 5, to fix the compensation of such deputy commissioners (except deputy commissioners appointed under subsection (a) of section 940 of this title) and other officers and employees; and (3) to make such expenditures (including expenditures for personal services and rent at the seat of government and elsewhere, for law books, books of reference, periodicals, and for printing and binding) as may be necessary in the administration of this chapter. All expenditures of the Secretary in the administration of this chapter shall be allowed and paid as provided in section 945 of this title upon the presentation of itemized vouchers therefor approved by the Secretary.

* * * * *

(c) Furnishing information and assistance; directing vocational rehabilitation

(1) The Secretary shall, upon request, provide persons covered by this chapter with information and assistance relating to the chapter's coverage and compensation and the procedures for obtaining such compensation and including assistance in processing a claim. The Secretary may, upon request, provide persons covered by this chapter with legal assistance in processing a claim. The Secretary shall also provide employees receiving compensation information on medical, manpower, and vocational rehabilitation services and assist such employees in obtaining the best such services available.

* * * * *

20 C.F.R., Pts. 701, 702, 801 and 802 provide in relevant part:

§ 701.201 Establishment of Office of Workers' Compensation Programs.

The Assistant Secretary of Labor for Employment Standards, by authority vested in him or her by the Secretary of Labor in Secretary's Order No. 7-87 (52 FR 48466), established in the Employment Standards Administration (ESA) an Office of Workers' Compensation Programs (OWCP). The Assistant Secretary further designated as the head thereof a Director, who shall administer the programs assigned to that office by the Assistant Secretary.

§ 701.202 Transfer of functions.

Pursuant to the authority vested in him or her by the Secretary of Labor, the Assistant Secretary for Employment Standards transferred from the Bureau of Employees' Compensation to the Office of Workers' Compensation Programs all functions of the Department of Labor with respect to the administration of benefits programs under the following statutes:

(a) The Longshore and Harbor Workers' Compensation Act, as amended and extended, 33 U.S.C. 901 et seq.;

* * * * *

§ 702.333 Formal hearings; parties.

(a) The necessary parties for a formal hearing are the claimant and the employer or insurance carrier, and the administrative law judge assigned the case.

(b) The Solicitor of Labor or his designee may appear and participate in any formal hearing held pursuant to these regulations on behalf of the Director as an interested party.

* * * * *

§ 801.102 Review authority.

(a) The Board is authorized, as provided in 33 U.S.C. 921(b), as amended, to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions or orders with respect to claims for compensation or benefits arising under the following Acts, as amended and extended:

(1) The Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 et seq.;

* * * * *

§ 802.410 Judicial review of Board decisions.

(a) Within 60 days after a decision by the Board has been filed pursuant to § 802.403(b), any party adversely affected or aggrieved by such decision may file a petition for review with the appropriate U.S. Court of Appeals pursuant to section 21(c) of the LHWCA.

(b) The Director, OWCP, as designee of the Secretary of Labor responsible for the administration and enforcement of the statutes listed in § 802.101, shall be deemed to be the proper party on behalf of the Secretary of Labor in all review proceedings conducted pursuant to section 21(c) of the LHWCA.

* * * * *

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No. 93-1783

In The

Supreme Court of the United States

October Term, 1994

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

v.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

JAMES M. MESNARD
SEYFARTH, SHAW, FAIRWEATHER & GERALDSON
Suite 500
815 Connecticut Ave., N.W.
Washington, D.C. 20006-4004
(202) 463-2400

Counsel for Respondent, Newport News Shipbuilding & Dry Dock Company

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

Should this Court exercise its discretionary jurisdiction to review a decision of the United States Court of Appeals for the Fourth Circuit when there is no true conflict among the circuits and the decision below materially affects few persons other than the Director, Office of Workers' Compensation Programs of the United States Department of Labor?

PARTIES

The petitioner is the Director, Office of Workers' Compensation Programs of the United States Department of Labor ("the Director"). The Respondent is the Newport News Shipbuilding and Dry Dock Company. The Claimant, Jackie Harcum, expressly declined to participate in the Director's appeal of the Benefits Review Board's decision to the United States Court of Appeals for the Fourth Circuit and he is not participating in this appeal.

CORPORATE AFFILIATIONS

The Newport News Shipbuilding and Dry Dock Company is a wholly owned subsidiary of Tenneco, Incorporated.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 2

ARGUMENT 2

I. THERE IS NO TRUE CONFLICT AMONG THE CIRCUITS AS TO WHETHER THE DIRECTOR HAS STANDING TO SEEK REVIEW OF BOARD DECISIONS WHEN THE CLAIMANT DOES NOT JOIN IN THE APPEAL 2

II. THE FOURTH CIRCUIT'S DECISION HAS LITTLE MATERIAL EFFECT ON ANYONE OTHER THAN THE DIRECTOR, AND THUS, THERE IS NO IMPORTANT REASON TO REVIEW THAT DECISION 6

CONCLUSION 7

TABLE OF AUTHORITIES

Page

CASES:

Director, O.W.C.P. v. Donzi Marine, Inc., 586 F.2d 377 (5th Cir. 1978) 3, 5, 7

Director, O.W.C.P. v. National Van Lines, Inc., 613 F.2d 972, 977 (D.C. Cir. 1979), *cert. denied*, 448 U.S. 907 (1980) 4

Director, O.W.C.P. v. Perini North River Assocs., 459 U.S. 297 (1983) 3

Fusco v. Perini N. River Assocs., 601 F.2d 659 (2d Cir. 1979), *vacated and remanded*, 444 U.S. 1028, *reinstated on remand*, 622 F.2d 111 (2d Cir. 1980), *cert. denied*, 449 U.S. 1131 (1981) 3

I.T.O. Corp. v. B.R.B., 563 F.2d 646 (4th Cir. 1977) 6

Shahady v. Atlas Tile & Marble Co., 673 F.3d 479 (D.C. Cir. 1982) 5

Thornton v. Brown & Root, Inc., 707 F.2d 149 (5th Cir. 1983), *cert. denied*, 464 U.S. 1052 (1984) 6

CONSTITUTION, STATUTES AND RULES:

U.S. Const. Art. III 5

Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* 1

33 U.S.C. § 921(c) 1, 3

33 U.S.C. § 944 6

Sup. Ct. R. 10.1 6

Fed. R. App. P. 15 6

No. 93-1783

In The

Supreme Court of the United States

October Term, 1994

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

v.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

This case arises under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* ("the Act"). The Respondent, the Newport News Shipbuilding and Dry Dock Company, by its undersigned counsel, respectfully submits this Brief in Opposition to the petition for a writ of certiorari of the United States Department of Labor's Director, Office of Workers' Compensation Programs ("the Director"). There is no conflict among the circuit courts of appeals on the question of the Director's standing to seek review of Benefits

Review Board's decisions when the claimant does not participate in the appeal. Moreover, the Director is seeking review of an issue of very limited importance. There is no important reason for this Court to review the court of appeal's decision, and thus, the Director's petition for a writ of certiorari should be denied.

STATEMENT OF THE CASE

The Director's Statement of the case notes that the court of appeals amended the caption of this case to reflect that Jackie Harcum was the Claimant in the proceedings below. The Director's statement is correct. The Director, however, omits the fact that, even though the caption was amended, the October 7, 1992 order of the clerk of the court of appeals also explicitly advised the Director that the Claimant was not a party to the review proceeding before the Fourth Circuit.

ARGUMENT

I. THERE IS NO TRUE CONFLICT AMONG THE CIRCUITS AS TO WHETHER THE DIRECTOR HAS STANDING TO SEEK REVIEW OF BOARD DECISIONS WHEN THE CLAIMANT DOES NOT JOIN IN THE APPEAL

The Director asserts that the courts of appeals have rendered conflicting decisions on the question of the Director's standing to petition the courts for review of decisions of the Department of Labor's Benefits Review Board ("the Board"). In addition to the decisions of the United States

Court of Appeals for the Fourth Circuit, the Second Circuit and the Fifth Circuit have also held that the Director does not have standing as a petitioner under Section 21(c) of the Act, 33 U.S.C. § 921(c), unless her pecuniary or specifically designated administrative interests are adversely affected. *See Fusco v. Perini N. River Assocs.*, 601 F.2d 659 (2d Cir. 1979), *vacated and remanded on other grnds.*, 444 U.S. 1028, *reinstated on remand*, 622 F.2d 111 (2d Cir. 1980), *cert. denied*, 449 U.S. 1131 (1981); *Director, O.W.C.P. v. Donzi Marine, Inc.*, 586 F.2d 377 (5th Cir. 1978).[1]

[1] This Court has not addressed the scope of the Director's standing to petition the courts of appeals for review of Board decisions. It has, however, recognized that, although Section 21(c) gives the Director the statutory authority to petition for review of Board decisions, she must still establish that she has standing. In other words, the Director *must* establish that she is adversely affected or aggrieved. *See Director, O.W.C.P. v. Perini North River Assocs.*, 459 U.S. 297, 302-03 (1983). In *Perini*, the respondent argued that the Director did not have standing to seek review of a Second Circuit decision, because the Director was simply attempting to further her interpretation of the Act. This Court did not reach Perini's argument, because the injured employee also filed a brief and was a party to the appeal, and there was no question that the employee had standing. *Id.* at 303-04. Nevertheless, this Court clearly indicated that in order to have standing, the Director must still be adversely affected or aggrieved:

> Although the Director has statutory authority to seek review in this Court, she *may* not have Art. III standing to argue the merits of Churchill's claim because the Director's presence does not guarantee the existence of a justiciable controversy with respect to the merits of Churchill's coverage under the LHWCA.

Id. at 304 (emphasis in original). Thus, the Director does *not* automatically have standing in each and every Longshore Act case before the courts of appeals.

Conversely, the D.C. Circuit has stated that the Director has standing to petition the courts of appeals for review of Board decisions based solely on her position. *Director, O.W.C.P. v. National Van Lines, Inc.*, 613 F.2d 972, 977 n.6 (D.C. Cir. 1979), *cert. denied*, 448 U.S. 907 (1980). The Director relies on this facial conflict among the circuits as the basis for her petition for a writ of certiorari.

The Director's argument, however, ignores a critical distinction in the *National Van Lines* decision. In that case, the claimant was also a party to the appeal. 613 F.2d at 976-77. The Claimant herein did not seek review of the Board's decision. In fact, in an October 1, 1992 letter[2] to the Clerk of the court of appeals for the Fourth Circuit, Claimant's counsel, on behalf of the Claimant, expressly declined to participate in any review proceeding:

> On behalf of my client Jackie Harcum I wish to state that we have not appealed the decision of the Benefits Review Board. The Director appealed the case and may pursue the case as the director chooses. Claimant has not appealed.

Attachment B to Respondent's Answer to Petitioner's Petition for Rehearing. The Claimant did not seek review of the Board's decision, and he clearly wanted no part of the Director's appeal to the court of appeals.

The only other case the Respondent is aware of addressing the Director's standing to seek review of a Board decision in which the claimant was not a petitioner

[2] The date appearing on Claimant's counsel letter is October 1, 1991. This is, however, a typographical error.

is *Donzi Marine*, 586 F.2d at 378-79.[3] In that case, the court of appeals held that the Director did not have standing as a petitioner. Thus, both courts of appeals that have considered the Director's standing to seek review of Board decisions, which do not adversely impact upon the Special Fund or any of the Director's enumerated responsibilities, *absent the Claimant's participation*, have held that standing does not exist. In such cases, there is no conflict among the circuits.[4] While there is broad language on this issue in other cases cited by the Director, *see Shahady v. Atlas Title & Marble Co.*, 673 F.3d 479, 480 (D.C. Cir. 1982), it is mere dicta because the claimant was at least a participant in those cases.

This Court should wait to address the standing issue until there is a clear conflict in the circuits. If courts of appeals directly address the statutory and Article III standing issues, and reach contrary holdings, then it may be appropriate for this Court to reflect on their reasoning and decide if the matter is worthy of consideration.

[3] The claimant in *Donzi Marine* was awarded benefits, but the Board vacated the compensation award because it determined that the claimant was not engaged in maritime employment. The Director sought review before the court of appeals, but the claimant did not join or participate in the Director's appeal. *Donzi Marine*, 586 F.2d at 378-79. In that case, the Fifth Circuit also held that the Director did not have standing.

[4] In its May 24, 1994 letter to this Court waiving its right to file an opposition to the Director's petition for a writ of certiorari, the Respondent did not disagree with the Director's assertion that there is a conflict among the circuits on this case. Upon further reflection, however, it is apparent that no true conflict exists.

II. THE FOURTH CIRCUIT'S DECISION HAS LITTLE MATERIAL EFFECT ON ANYONE OTHER THAN THE DIRECTOR, AND THUS, THERE IS NO IMPORTANT REASON TO REVIEW THAT DECISION

This Court's Rules provide that "[a] petition for a writ of certiorari will be granted only when there are special and important reasons therefore." Sup. Ct. R. 10.1. The Rule further provides that one of the reasons which this Court will consider when determining whether to exercise its discretionary power is whether the United States courts of appeals have rendered conflicting decisions on an issue. Sup. Ct. R. 10.1(a). The Director's petition attempts to rely on such a conflict. Such a conflict, as pointed out above, does not exist. Nevertheless, even if such a conflict were to exist, it would not, by itself, be sufficient. The issue must be important.

The issue the Director is asking this Court to review is, however, extremely limited in practical applicability. The Fourth Circuit's decision below noted that the Director, as administrator of the Special Fund created by 33 U.S.C. § 944, clearly has standing to seek review of Board decisions adversely impacting upon the fund. She may also seek review of Board decisions adversely affecting her various specifically designated statutory responsibilities. (Appendix A to Director's Petition for a Writ of Certiorari, 10a-11a). Moreover, in any case not meeting either of these criteria, the Director may move to intervene for good cause pursuant to Rule 15 of the Federal Rules of Appellate Procedure. *See I.T.O. Corp. v. B.R.B.*, 563 F.2d 646, 648 (4th Cir. 1977); *Thornton v. Brown & Root, Inc.*, 707 F.2d 149, 154 (5th Cir. 1983), *cert. denied*, 464 U.S. 1052 (1984). The majority of appellate cases arising under the Longshore Act fall into one, or more, of these three categories.

Cases where the Director alone seeks review of a Board decision concerning the amount of compensation to which a particular claimant may be entitled are anomalous.

The fact that only two cases, *Donzi Marine* and the decision below, have been reported where the Director sought to prosecute such an appeal without the claimant's participation, establishes that the issue the Director wishes reviewed is of no general importance and is extremely limited in its applicability. The question is neither special nor important, and the Director's petition for certiorari should be denied.

CONCLUSION

Petitioner's Petition for Certiorari should be denied.

Respectfully submitted,

JAMES M. MESNARD
SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON
Suite 500
815 Connecticut Ave., N.W.
Washington, D.C. 20006-4004
(202) 463-2400

Attorney for Respondents

(3)

No. 93-1783

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In the Supreme Court of the United States

OCTOBER TERM, 1994

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

8 pp

TABLE OF AUTHORITIES

Cases:	Page
Curtis v. *Schlumberger Offshore Serv., Inc.*, 849 F.2d 805 (3d Cir. 1988)	4, 6
Diamond v. *Charles*, 476 U.S. 54 (1986)	5
Director, OWCP v. *Bethlehem Steel Corp.*, 620 F.2d 60 (5th Cir. 1980)	4
Director, OWCP v. *Donzi Marine, Inc.*, 586 F.2d 377 (5th Cir. 1978)	2
Director, OWCP v. *National Van Lines, Inc.*, 613 F.2d 972 (D.C. Cir. 1979), cert. denied, 448 U.S. 907 (1980)	2, 3
Director, OWCP v. *Perini N. River Assocs.*, 459 U.S. 297 (1983)	4
Director, OWCP v. *Rochester & Pittsbutrg Coal Co.*, 678 F.2d 17 (3d Cir. 1982)	3, 4
Fusco v. *Perini N. River Assocs.*, 601 F.2d 659 (2d Cir. 1979), vacated and remanded, 444 U.S. 1028 (1980), reinstated on remand, 622 F.2d 1111 (2d Cir. 1980), cert. denied, 449 U.S. 1131 (1981)	2, 4
Shahady v. *Atlas Tile & Marble Co.*, 673 F.2d 479 (D.C. Cir. 1982)	2, 3

Constitution and statutes:	
U.S. Const. Art. III	4
Black Lung Benefits Act, 30 U.S.C. 932(a)	3, 5
Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq*:	
§ 21(c), 33 U.S.C. 921(c)	1, 3
§ 44(a), 33 U.S.C. 944(a)	1
28 U.S.C. 1254(1)	5

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v.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

In this case, the court of appeals held that the Director of the Office of Workers' Compensation Programs (OWCP) is without standing to petition for review, under Section 21(c) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 921(c), of the decision rendered by the Benefits Review Board (the Board) on an LHWCA claim. The court held that the Director lacks standing unless the Board's decision will affect the Special Fund administered by the Director, 33 U.S.C. 944(a), or will disrupt the Director's specifically designated administrative functions. In our petition, we show that the Director's standing is not so circum-

scribed, and that based on her broad administrative role under the LHWCA, she has standing to challenge a Board decision resolving a benefits controversy. We also show that this issue is one that has divided the courts of appeals and is important to the enforcement of the LHWCA. Respondent Newport News Shipbuilding and Dry Dock Company does not offer a defense of the court of appeals' ruling on the merits of the standing issue, but respondent nevertheless urges the Court to deny review. The reasons it advances, however, are not persuasive.

1. In its May 24, 1994, letter to the Court waiving its right to file a response to the certiorari petition, respondent agreed with our submission that there is a conflict among the circuits on the question presented. Respondent now contends (Br. in Opp. 2, 4), however, that there is not a "true" conflict and that certiorari should be denied. Respondent was correct the first time around.

In the certiorari petition, we demonstrate that while decisions of the Second and Fifth Circuits agree with the approach to the Director's standing taken by the court below (see *Fusco* v. *Perini N. River Assocs.*, 601 F.2d 659 (2d Cir. 1979), vacated and remanded on other grounds, 444 U.S. 1028 (1980), reinstated on remand, 622 F.2d 1111, 1113 (2d Cir. 1980), cert. denied, 449 U.S. 1131 (1981); *Director, OWCP* v. *Donzi Marine, Inc.*, 586 F.2d 377, 382 (5th Cir. 1978)), the District of Columbia Circuit has recognized that the Director's general supervisory and enforcement interests under the LHWCA provide her with standing to challenge Board decisions on LHWCA claims. *Shahady* v. *Atlas Tile & Marble Co.*, 673 F.2d 479, 483 (D.C. Cir. 1982); *Director, OWCP* v. *National Van Lines, Inc.*, 613 F.2d 972, 977 n.6 (D.C. Cir. 1979), cert. denied, 448 U.S. 907 (1980).

Respondent acknowledges (Br. in Opp. 4-5) that the D.C. Circuit decisions upon which the Director relies

state that the Director should be accorded broad standing. The court of appeals in the instant case viewed the D.C. Circuit's position in *Shahady* as conflicting with the position that it adopted. See Pet. App. 12a (court of appeals' prefacing of citation to *Shahady* with "*but see*"). Respondent contends that the conflict is not a "true" conflict because in the D.C. Circuit decision upholding the Director's standing as a petitioner—*National Van Lines*, which was explained in *Shahady*—the claimant was also a petitioner. Br. in Opp. 4. In *National Van Lines*, however, the court's decision to entertain the Director's petition was not premised upon the presence of the claimant as a petitioner in the case. Rather, the court concluded that the Director had standing in her own right, based upon her own interests. 613 F.2d at 977 n.6. As a result, in the D.C. Circuit, "the Director's general supervisory and enforcement interest, apart from any pecuniary interest, is sufficient to confer upon the Director standing to file a petition for review under [S]ection 921(c)." *Shahady*, 673 F.2d at 483. It therefore is clear that the D.C. Circuit would entertain the Director's challenge to the Board's order that the Fourth Circuit refused to entertain in this case.

In addition, respondent ignores the decision of the Third Circuit in *Director, OWCP* v. *Rochester & Pittsburgh Coal Co.*, 678 F.2d 17 (1982), which held that the Director has standing to petition for review under Section 21(c) of the LHWCA, as incorporated by the Black Lung Benefits Act (BLBA), 30 U.S.C. 932(a). See Pet. 12-13. The Third Circuit based its holding on the Director's "responsibility to ensure the proper enforcement and lawful administration of the black lung benefits program," even though the government had not paid any benefits to the claimant during the period in question and the Director therefore lacked a pecuniary interest in

the resolution of the benefit claim. 678 F.2d at 18-19 n.2. Although the claimant also appeared as a respondent before the court of appeals in *Rochester & Pittsburgh*, the Third Circuit analyzed the Director's standing without reference to the claimant's presence, and it concluded that the Director's administrative role provided her with standing to petition for review. See also *Curtis* v. *Schlumberger Offshore Serv., Inc.*, 849 F.2d 805, 807 n.4 (3d Cir. 1988) (indicating approval of *Shahady*, although not reaching the issue).

Respondent's view that appellate decisions on this issue can be explained by the presence or absence of the claimant as a party to the appeal is also inconsistent with appellate decisions that have denied the Director standing. For example, in *Director, OWCP* v. *Bethlehem Steel Corp.*, 620 F.2d 60, 63 (5th Cir. 1980), the court of appeals concluded that the Director failed to meet the *Donzi Marine* test for standing and therefore declined to consider his petition, even though the claimant also appeared before that court as a petitioner. *Id.* at 63; see also *Fusco*, 601 F.2d at 670 (court dismissed Director's petition for review, although claimants were also present as petitioners).

In short, courts of appeals have addressed separately the question whether the Director has standing—and have dismissed or entertained the Director's petition for review depending upon their divergent approaches to that question—without regard to whether the claimant was also a party in the court of appeals. The Court left open the question of the Director's standing in *Director, OWCP* v. *Perini N. River Assocs.*, 459 U.S. 297, 302-305 & n.9 (1983), and there is a circuit conflict on that issue.[1]

[1] In *Perini*, the Court declined to decide whether the Director has Article III standing to file a petition for a writ of certiorari

This Court should grant certiorari to resolve that conflict.

2. Respondent asserts (Br. in Opp. 2, 6) that the issue presented in this case is of "very limited importance" and therefore does not warrant review by this Court because the court of appeals' decision "has little material effect on anyone other than the Director." *Id.* at 6. The Director, however, is the officer charged by Congress with enforcement and administration of the Act, and, as we demonstrate in our petition, Congress intended her to have broad authority to protect and advance the public interest in resolution of benefit claims arising under the LHWCA. Pet. 15-19.[2] The nature and scope of the Director's standing is therefore an important question that warrants this Court's review.

Respondent is not on firm ground in suggesting (Br. in Opp. 6-7) that the Director can sufficiently carry out the broad role envisioned by Congress by intervening in cases in which petitions for review are filed by other parties. As this case illustrates, the Director cannot always rely on other parties to challenge Board

because the employer in that case had conceded that the Director was a proper respondent before the court of appeals (and thus was statutorily entitled to file a certiorari petition under 28 U.S.C. 1254(1)), and because the claimant participated before this Court as a respondent and filed briefs in support of the Director. But see *Diamond* v. *Charles*, 476 U.S. 54, 62-63 (1986) (holding intervenor defendant could not appeal from judgment that State declined to appeal). Because the Court reserved the question, respondent is wrong in suggesting (Br. in Opp. 3 n.1) that the Court in *Perini* ruled that "the Director does *not* automatically have standing in each and every Longshore Act case before the courts of appeals."

[2] Respondent also ignores the fact that the issue presented by this case can present itself in cases arising under the Black Lung Benefits Act. See Pet. 17-19.

decisions that she believes warrant judicial review. The Director's "responsibility to oversee the development of a consistent body of law in this area should not depend upon the vagaries of the parties' private, albeit adversary, interests." *Curtis, Inc.*, 849 F.2d at 807 n.4.

* * * * *

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

DREW S. DAYS, III
Solicitor General

JULY 1994

Supreme Court, U.S.
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No. 93-1783

In the Supreme Court of the United States

OCTOBER TERM, 1994

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

DREW S. DAYS, III
Solicitor General

LAWRENCE G. WALLACE
Deputy Solicitor General

BETH S. BRINKMANN
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

THOMAS S. WILLIAMS, JR.
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

STEVEN J. MANDEL
Deputy Associate Solicitor

MARK S. FLYNN
Senior Appellate Attorney
Department of Labor
Washington, D.C. 20210

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the standing of the Director, Office of Workers' Compensation Programs in the United States Department of Labor, to petition the courts of appeals for review of a decision of the Benefits Review Board under Section 21(c) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 921(c), is limited to issues that affect the Director's pecuniary interest or disrupt a specific administrative function.

II

PARTIES TO THE PROCEEDINGS

The Director of the Office of Workers' Compensation Programs in the United States Department of Labor was the petitioner in the proceeding below. The employer, Newport News Shipbuilding and Dry Dock Company, was the respondent, and Jackie Harcum was designated the claimant.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory and regulatory provisions involved	2
Statement	2
Summary of argument	10
Argument:	
The standing of the Director of the Office of Workers' Compensation Programs to petition for judicial review of decisions by the Benefits Review Board is not limited to decisions that affect the Director's pecuniary interest or disrupt her performance of specific administrative functions	11
A. The text and structure of the Longshore and Harbor Workers' Compensation Act indicate that Congress gave the Director a stake in claim adjudications and vested her with standing to obtain judicial review of erroneous Benefits Review Board rulings	14
1. The Act confers broad adminstrative and enforcement duties on the Director	14
2. Congress imposed specific duties on the Director with regard to the claims adjudication process and assisting disabled employees, which also give the Director standing	22
B. The history of the Act confirms Congress's intention to confer on the Director standing to seek judicial review of board rulings	25
Conclusion	32

TABLE OF AUTHORITIES

Cases:

Alfred L. Snapp & Son, Inc. v. *Puerto Rico*, 458 U.S. 592 (1982) 15
American Ship Bldg. Co. v. *Director, OWCP*, 865 F.2d 727 (6th Cir. 1989) 16
Bell v. *New Jersey*, 461 U.S. 773 (1983) 28
Boudreaux v. *American Workover, Inc.*, 680 F.2d 1034 (5th Cir. 1982), cert. denied, 459 U.S. 1170 (1983) 16
Coleman v. *Miller*, 307 U.S. 433 (1939) 15
Columbia Gas Systems Inc., In re, 33 F.2d 294 (3d Cir. 1994) 25
Curtis v. *Schlumberger Offshore Serv., Inc.*, 849 F.2d 805 (3d Cir. 1988) 20, 21
Debs, In re, 158 U.S. 564 (1895) 15
Director, OWCP v. *Alabama By-Products Corp.*, 560 F.2d 710 (5th Cir. 1977) 30
Director, OWCP v. *Bethlehem Steel Corp.*, 949 F.2d 185 (5th Cir. 1991) 19, 22
Director, OWCP v. *Donzi Marine, Inc.*, 586 F.2d 377 (5th Cir. 1978) 9, 20, 22
Director, OWCP v. *Eastern Coal Corp.*, 561 F.2d 632 (6th Cir. 1977) 14-15, 20, 25, 27, 30
Director, OWCP v. *General Dynamics Corp.* 982 F.2d 790 (2d Cir. 1992) 16
Director, OWCP v. *National Mines Corp.*, 554 F.2d 1267 (4th Cir. 1977) 30
Director, OWCP v. *National Van Lines, Inc.*, 613 F.2d 972 (D.C. Cir. 1979), cert. denied, 448 U.S. 907 (1980) .. 19
Director, OWCP v. *Newport News Shipbuidling & Dry Dock Co.*, 676 F.2d 110 (4th Cir. 1982) 9
Director, OWCP v. *Peabody Coal Co.*, 554 F.2d 310 (7th Cir. 1977) 30
Director, OWCP v. *Perini N. River Assocs.*, 459 U.S. 297 (1983) 20, 21

Cases—Continued: Page

Director, OWCP v. *Rochester & Pittsburgh Coal Co.*, 678 F.2d 17 (3d Cir. 1982) 20, 30
Donovan v. *University of Texas at El Paso*, 643 F.2d 1201 (5th Cir. 1981) 18
FCC v. *Sanders Bros. Radio Station*, 309 U.S. 470 (1940) 25
Flast v. *Cohen*, 392 U.S. 83 (1968) 12, 13
Fusco v. *Perini N. River Assocs.*, 601 F.2d 659 (2d Cir. 1979), vacated and remanded on other grounds, 444 U.S. 1028, reinstated on remand, 622 F.2d 1111 (2d Cir. 1976), cert. denied, 449 U.S. 1131 (1981) 20
General Tel. Co. v. *EEOC*, 446 U.S. 318 (1980) 18
Goldsmith v. *Director, OWCP*, 838 F.2d 1079 (9th Cir. 1988) 21
Heckman v. *United States*, 224 U.S. 413 (1912) 18
Henderson v. *Glens Falls Indem. Co.*, 134 F.2d 320 (5th Cir.), cert. denied, 319 U.S. 756 (1943) 26
I.T.O. Corp. v. *Benefits Review Bd.*, 563 F.2d 646 (4th Cir. 1977), reinstating in pertinent part, 542 F.2d 903 (4th Cir. 1976), vacated and remanded, 433 U.S. 904 (1977) 10, 20, 27
Ingalls Shipbuilding Div., Etc. v. *White*, 681 F.2d 275 (5th Cir. 1982), overruled in part on other grounds, *Newpark Shipbuilding & Repair, Inc.* v. *Roundtree*, 723 F.2d 399 (5th Cir.), cert. denied, 469 U.S. 818 (1984) 21, 27-28, 30
Kalaris v. *Donovan*, 697 F.2d 376 (D.C. Cir.), cert. denied, 462 U.S. 1119 (1983) 26, 27
Krolick Contracting Corp. v. *Benefits Review Bd.*, 558 F.2d 685 (3d Cir. 1977) 30
Linda R.S. v. *Richard D.*, 410 U.S. 614 (1973) 12
Lujan v. *Defenders of Wildlife*, 112 S. Ct. 2130 (1992) 12, 13
Marchie Tiger v. *Western Inv. Co.*, 221 U.S. 286 (1911) ... 28
Martin v. *OSHRC*, 499 U.S. 144 (1991) 16-17
Moe v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976) 18

Cases—Continued: Page

Mullins Coal Co. v. *Director, OWCP*, 484 U.S. 135 (1987) 16
Newport News Shipbuilding & Dry Dock Co. v. *Howard*, 904 F.2d 206 (4th Cir. 1990) 16
Northeast Marine Terminal Co. v. *Caputo*, 432 U.S. 249 (1977) 17
Pasadena City Bd. of Educ. v. *Spangler*, 427 U.S. 424 (1976) 18
Potomac Elec. Power Co. v. *Director, OWCP*, 449 U.S. 268 (1980) 16
Sea-Land Serv., Inc. v. *Rock*, 953 F.2d 56 (3d Cir. 1992) 16
SEC v. *United States Realty & Improvement Co.*, 310 U.S. 434 (1940) 15
Secretary of Labor v. *Fitzsimmons*, 805 F.2d 682 (7th Cir. 1986) 18
Shahady v. *Atlas Tile & Marble Co.*, 673 F.2d 479 (D.C. Cir. 1982) 19, 21, 27
Sierra Club v. *Morton*, 405 U.S. 727 (1972) 12, 13, 25
Stevens v. *Director, OWCP*, 909 F.2d 1256 (9th Cir. 1990), cert. denied, 498 U.S. 1073 (1991) 7
Stevens v. *Lockheed Shipbuilding Co.*, 22 Ben. Rev. Bd. Serv. (MB), 155 (1989), rev'd 909 F.2d 1256 (9th Cir. 1990), cert. denied, 498 U.S. 1073 (1991) 6
Thornton v. *Brown& Root, Inc.*, 707 F.2d 149 (5th Cir. 1983), cert. denied, 464 U.S. 1052 (1984) 21
United States v. *Federal Maritime Comm'n*:
655 F.2d 247 (D.C. Cir. 1980) 15
694 F.2d 793 (D.C. Cir. 1982) 15
United States ex rel. Chapman v. *Federal Power Comm'n*, 345 U.S. 153 (1953) 15
Valley Forge Christian College v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982) 12
Voris v. *Eikel*, 346 U.S. 328 (1953) 18

Cases—Continued: Page

Warth v. *Seldin*, 422 U.S. 490 (1975) 12
Washington Utils. & Transp. Comm'n v. *FCC*, 513 F.2d 1142 (9th Cir. 1975) 25
West Virginia Univ. Hosp., Inc. v. *Casey*, 499 U.S. 83 (1991) 29
White v. *Ingalls Shipbuilding Div., Litton Sys., Inc.*, 12 Ben. Rev. Bd. Serv. (MB) 905 (1980) 28
Zapata Haynie Corp. v. *Barnard*, 933 F.2d 256 (4th Cir. 1991) 16

Constitution, statutes, regulations and rule:

U.S. Const. Art. III 11, 12, 13, 21
Federal Mines Safety and Health Act of 1977, as amended Black Lung Benefits Act, Pub. L. No. 95-239, 92 Stat. 99, 30 U.S.C. 901 *et seq.* 3, 17, 28
30 U.S.C. 932(a) 30
30 U.S.C. 932(k) 29, 30
Defense Base Act, 42 U.S.C. 1651 *et seq.* 3
District of Columbia Workmen's Compsensation Act, 36 D.C. Code 501 *et seq.* (1973) 3
5 U.S.C. 554 4
Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* ..... *passim*
33 U.S.C. 904 2
33 U.S.C. 905 2
33 U.S.C. 906-909 2
33 U.S.C. 907(b) 5, 23
33 U.S.C. 907(c) 23
33 U.S.C. 908(f) (§ 8(f)) 6, 24
33 U.S.C. 908(i) 5, 23
33 U.S.C. 912 3
33 U.S.C. 913(a) 3
33 U.S.C. 914 ..... 4, 19
33 U.S.C. 914(a) 3, 23
33 U.S.C. 914(h)(1) 4, 23

Statutes,regulations and rule—Continued:	Page
33 U.S.C. 914(h)(2)	4
33 U.S.C. 915(a)	24
33 U.S.C. 915(b)	24
33 U.S.C. 918(b)	
33 U.S.C. 919(c)	4, 19, 23
33 U.S.C. 919(d)	4
33 U.S.C. 919(e)	4
33 U.S.C. 921(b)	2
33 U.S.C. 921(b)(3) (§ 21(b)(3))	4, 7, 15, 27
33 U.S.C. 921(c) (§ 21(c)	*passim*
33 U.S.C. 921(d)	2, 5, 16
33 U.S.C. 921a	2, 14
33 U.S.C. 931	23
33 U.S.C. 932(k)	14
33 U.S.C. 933(i)	2
33 U.S.C. 939(a)	2, 15
33 U.S.C. 939(c)	2, 5, 24
33 U.S.C. 939(c)(1)	23
33 U.S.C. 939(c)(2)	24
33 U.S.C. 940(a)	3
33 U.S.C. 944	5, 24
33 U.S.C. 944(a)	6
Longshoremen's and Harbor Workers' Compsensation Act, ch. 509, § 21(b), 44 Stat. 1436 (1927)	26, 28
Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, 86 Stat. 1251	26
Nonappropriated Fund Instrumentalities Act, 5 U.S.C. 8171 *et seq.*	3
Outer Continental Shelf Lands Act, 43 U.S.C. 1331	3
28 U.S.C. 1291	26
20 C.F.R.:	
Section 701.101	3
Section 701.102	3
Section 701.201	2, 3
Section 701.202	2
Section 701.202(a)	3
Section 701.202(b)-(f)	3

Statutes, regulations and rule—Continued:	Page
Section 701.203	3
Section 701.301(a)(7)	3
Section 702.105	3
Section 702.301 *et seq.*	19
Sections 702.301-702.317	4
Sections 702.331-702.351	4
Section 702.333	2
Section 702.333(a)	4
Section 702.333(b)	4, 15
Sections 718 *et seq.*	3
Section 801.2(a)(10)	4, 15
Section 801.102	2, 4, 15
Section 801.104	4
Section 802.101 *et seq.*	31
Section 802.201	15
Section 802.201(a)	28
Section 802.201(a)(a)	15, 16
Section 802.410	2
Section 802.410(a)	16, 28
Section 802.410(b)	5, 16
Fed. R. App. P. 15(a)	21
Miscellaneous:	
E. Chemerinsky, *Federal Jurisdiction* (1989)	8
H.R. Conf. Rep. No. 864, 95th Cong., 1st Sess. (1978)	30
H.R. Rep. No. 1441, 92d Cong., 2d Sess. (1972)	18, 27
A. Larson, *The Law of Workmen's Compensation* (1993):	
Vol. 1	17
Vol. 3	17
S. Rep. No. 1125, 92d Cong., 2d Sess. (1972)	18, 27
S. Rep. No. 209, 95th, Cong., 1st Sess. (1977)	29

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-1783

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 8 F.3d 175. The decision of the Benefits Review Board (Pet. App. 27a-36a) is unreported. The decision of the administrative law judge (Pet. App. 37a-62a) is reported at 23 Ben. Rev. Bd. Serv. (MB) 515.

JURISDICTION

The court of appeals entered its judgment on October 29, 1993, and denied petitions for rehearing on January 7, 1994. Pet. App. 25a-26a. On March 28, 1994, the Chief Justice extended the time within which to file a petition

for a writ of certiorari to and including May 7, 1994. The petition for a writ of certiorari was filed on May 9, 1994 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent provisions of the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 921(b), 921(c), 921(d), 921a, 939(a), 939(c)) are reprinted at Pet. App. 63a-66a. Pertinent provisions of the Department of Labor regulations (20 C.F.R. 701.201, 701.202, 702.333, 801.102, 802.410) are reprinted at Pet. App. 67a-68a.

STATEMENT

A. The Statutory Framework

1. The Longshore and Harbor Workers' Compensation Act (LHWCA or Act), 33 U.S.C. 901 *et seq.*, creates a comprehensive federal scheme to compensate maritime workers injured or killed while employed upon the navigable waters of the United States. Under the Act, employers are liable up to a statutory maximum for covered injuries without regard to fault as a cause for the injury or death, and have certain duties to furnish medical services in connection with injuries. 33 U.S.C. 904, 906-909. In most instances, the employer's liability under the Act is exclusive and in place of all other liability to the employee on account of the injury or death. 33 U.S.C. 905 and 933(i).

Congress directed the Secretary of Labor to "administer the provisions" of the LHWCA and to issue any necessary rules and regulations. 33 U.S.C. 939(a). The Secretary established the Office of Workers' Compensation Programs (OWCP) and delegated the responsibility for administration of the benefits program under

the LHWCA to the OWCP Director (Director). See 20 C.F.R. 701.201, 701.202(a).[1]

Employees or survivors seeking compensation under the LHWCA must notify the employer and file a claim with a district director of OWCP. 33 U.S.C. 912 and 913(a).[2] Compensation generally is to be paid promptly to eligible persons without issuance of a formal compensation award. 33 U.S.C. 914(a). A district director may, upon his own initiative at any time,

---

[1] The history of the authority to administer the Act and the delegation of that authority is set forth in 20 C.F.R. 701.203. The statutory language speaks in terms of powers vested in the Secretary. In light of the Secretary's delegation of those responsibilities to the Director, however, we refer throughout this brief to the Director rather than the Secretary as the bearer of the statutory duties.

In addition to administering the LHWCA benefits program, the Director is responsible for administration of the benefits programs under the Defense Base Act, 42 U.S.C. 1651 *et seq.*, the District of Columbia Workmen's Compensation Act, 36 D.C. Code 501 *et seq.* (1973), the Outer Continental Shelf Lands Act, 43 U.S.C. 1331, the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. 8171 *et seq.*, and Title IV of the Federal Mine Safety and Health Act of 1977, as amended (known as the Black Lung Benefits Act (BLBA)), 30 U.S.C. 901 *et seq.* See 20 C.F.R. 701.202(b)-(f). The first four of those Acts are direct extensions of the LHWCA, and the same regulations generally govern the administration of the programs under those Acts, with a few exceptions. See 20 C.F.R. 701.101, 701.102. The regulations governing administration of the BLBA are set forth immediately following the LHWCA regulations. See 20 C.F.R. 718 *et seq.*

[2] Congress provided for the appointment by the Secretary of "deputy commissioners," 33 U.S.C. 940(a), who are now referred to as "district directors" for administrative purposes. See 20 C.F.R. 701.301(a)(7), 702.105. District directors, under the authority of the Secretary and Director, perform much of the day-to-day administration of the Act.

investigate a case in which payments are being made without an award. 33 U.S.C. 914(h)(1), 919(c). If a dispute regarding a claim arises, a district director must conduct an investigation and "take such further action as he considers will properly protect the rights of all parties." 33 U.S.C. 914(h)(2). District directors have authority to make a compensation award. 33 U.S.C. 914. If a district director is unable to resolve a claim informally, the claim is forwarded to an administrative law judge (ALJ). 33 U.S.C. 919(d).

ALJs are empowered to conduct formal hearings in compliance with the provisions of 5 U.S.C. 554, and to issue compensation orders. 33 U.S.C. 919(c), (d) and (e); 20 C.F.R. 702.301-702.317; 702.331-702.351. Implementing regulations provide that the claimant and the employer (or its insurance carrier) are necessary parties for a hearing before an ALJ. 20 C.F.R. 702.333(a). The Solicitor of Labor or his designee may participate in ALJ hearings on behalf of the Director as an "interested party." 20 C.F.R. 702.333(b).

Appeals raising a substantial question of law or fact may be taken to the Benefits Review Board (Board) "by any party in interest" from ALJ decisions with respect to benefit and compensation claims under the Act. 33 U.S.C. 921(b)(3); 20 C.F.R. 801.102. The terms "party" and "party in interest" are defined to mean "the Secretary or his designee and any person or business entity directly affected by the decision or order from which an appeal to the Board is taken." 20 C.F.R. 801.2(a)(10). The Board reviews an ALJ's decision to determine if it is supported by substantial evidence and is in accordance with the law. 33 U.S.C. 921(b)(3); 20 C.F.R. 801.102.

Decisions by the Board are reviewable by the courts of appeals. 33 U.S.C. 921(c). "Any person adversely

affected or aggrieved by a final order of the Board may obtain a review of that order" in a court of appeals. *Ibid.* The Director, as designee of the Secretary "responsible for the administration and enforcement" of the Act, "shall be deemed to be the proper party on behalf of the Secretary of Labor in all review proceedings conducted pursuant to section 21(c)." 20 C.F.R. 802.410(b).

2. In addition to her statutorily established role in the claim adjudication process, the Director performs a wide range of duties under the Act that promote the public interest, including providing assistance to individual claimants. For example, the Director must provide information and assistance in the claim adjudication process to any claimant who requests it, and she is permitted to provide claimants with legal assistance in processing a claim. 33 U.S.C. 939(c). The Director, through the district directors, reviews settlements to ensure that they are not inadequate and not procured by duress. 33 U.S.C. 908(i). She actively supervises the medical care rendered to injured employees, 33 U.S.C. 907(b), and provides information about medical and rehabilitative services, 33 U.S.C. 939(c). District directors may also bring actions in district court to enforce compensation awards, 33 U.S.C. 921(d), and the Director administers a special fund for payment of benefits in specified circumstances, 33 U.S.C. 944.

B. The Pending Case

1. Claimant Jackie Harcum, an employee of respondent Newport News Shipbuilding and Dry Dock Co., suffered a work-related, disabling back injury and filed a claim for benefits under the Act. Pet. App. 2a. The claim was referred to an ALJ for a hearing to resolve several disputed issues, including whether claimant Harcum was entitled to benefits for total (not

merely partial) disability from the date that he stopped work at respondent's shipyard (May 6, 1988) until the date he found alternative employment (February 16, 1989). *Id.* at 6a, 39a.[3]

The ALJ applied the rationale of the Board's decision in *Stevens* v. *Lockheed Shipbuilding Co.*, 22 Ben. Rev. Bd. Serv. (MB) 155 (1989), which held that total disability becomes partial when a claimant regains residual wage-earning capacity, and the partial disability relates back to the date of a claimant's maximum medical improvement. The ALJ thus reasoned that claimant Harcum was entitled only to partial (rather than total) disability benefits as of May 6, 1988, because that was the date he left employment with respondent and because the date of his maximum medical improvement had already passed. Pet. App. 6a, 56a-57a. The ALJ held that Harcum

[3] Respondent also asserted that Harcum suffered from a preexisting permanent partial disability that contributed to his current disability, and that respondent consequently was entitled to a reduction in the amount of benefits it was required to pay because the special fund administered by the Secretary should assume payment for part of the benefits under Section 8(f) of the Act. Pet. App. 7a. See 33 U.S.C. 908(f) (special fund assumes liability for compensation payment for injury after 104 weeks of permanent disability if claimant had preexisting permanent partial disability that combined with his compensable injury to render him more disabled than he would have been from the injury alone); 33 U.S.C. 944(a).

The ALJ and the Board agreed with respondent that Section 8(f) applied to this case. Pet. App. 7a, 33a-36a, 59a-61a. The court of appeals, however, rejected both the Director's and respondent's interpretations of Section 8(f), reversed the Board's ruling on that issue, and remanded the case for further proceedings. Pet. App. 14a-24a. Although the Director disagrees with the court of appeals' Section 8(f) ruling, she did not seek this Court's review of that ruling.

should be deemed to have regained residual wage-earning capacity as of May 6, 1988, and that he therefore should have received compensation after that date based only on a partial disability. *Id.* at 57a.

2. The Director appealed the ALJ's ruling to the Board pursuant to Section 21(b)(3) of the LHWCA, 33 U.S.C. 921(b)(3). Pet. App. 7a. The Director contended that the claimant was entitled to benefits based on total disability until February 16, 1989, when he secured other employment. Claimant Harcum did not appeal, but did respond in support of the Director. *Id.* at 29a. Respondent urged affirmance. *Ibid.*

The Board affirmed the ALJ's ruling, although it clarified the underlying rationale. The Board vacated the ALJ's reliance on its *Stevens* ruling because that decision had subsequently been reversed on judicial review. Pet. App. 29a-31a; *Stevens* v. *Director, OWCP*, 909 F.2d 1256 (9th Cir. 1990), cert. denied, 498 U.S. 1073 (1991). The Board affirmed, however, on the rationale that respondent's uncontradicted evidence showed that there was suitable alternative employment for Harcum as of May 1988, and that Harcum had not shown that he was unable to obtain such employment. Pet. App. 31a-33a. The Board also ruled that a statement by respondent to Harcum that it would determine whether it had a light-duty position available for him, and its subsequent hiring of a vocational consultant to assist Harcum in securing alternative employment, did not affect his obligation to show inability to find other employment, because respondent was not under any obligation to rehire Harcum or to find him an actual job offer. *Id.* at 32a-33a. The Board therefore concluded that Harcum was only partially disabled as of May 1988.

3. The Director filed a petition in the court of appeals for review of the Board's decision pursuant to 33 U.S.C.

921(c). Claimant Harcum did not file a petition for review. In response to an inquiry from the court of appeals (following the Director's motion to amend the case caption and respondent's statement that it did not object), Harcum stated that he had not appealed, but that the Director could pursue the case as she chose. See Attachments A and B to Respondent's Answer to Petitioner's Petition for Rehearing. The court of appeals granted the Director's motion and amended the caption to show Harcum as a "claimant."

The Director contended on judicial review that the Board usurped the ALJ's fact-finding role with regard to its holding that respondent had established that there was suitable alternative employment for Harcum. The Director also argued that, even if respondent had made a showing of suitable alternative employment, Harcum had legitimately relied on respondent's vocational rehabilitation program, rather than independently seeking work, during the period in question. Thus, the Director argued that the Board's decision erroneously denied Harcum total disability benefits for the period between May 1988 and February 1989. Pet. App. 2a.

The court of appeals raised, sua sponte, the question of the Director's standing to appeal. It concluded that the Director did not have standing to petition for review of the Board's ruling with regard to the degree of Harcum's disability. Pet. App. 9a n.1, 13a-14a. The court reasoned that 33 U.S.C. 921(c), which permits "[a]ny person adversely affected or aggrieved by a final order of the Board" to obtain judicial review of that order, "codifies the constitutional requirement that limits standing to those persons who can allege 'that they personally have suffered or imminently will suffer an injury.'" Pet. App. 9a n.1 (quoting E. Chemerinsky, *Federal Jurisdiction* § 2.3.2, at 52 (1989)). In the court's view, the Director

suffers an injury only when a Board decision "alter[s] the Director's ability to carry out his or her responsibilities under the LHWCA or to protect the fiscal integrity of the special fund." Pet App. 14a.

In holding that the Director lacks standing, the court of appeals relied on *Director, OWCP* v. *Donzi Marine, Inc.*, 586 F.2d 377 (5th Cir. 1978). Pet. App. 10a-12a. The court explained that in *Donzi Marine*, the Fifth Circuit held that the Director "would have standing only if an interest of the Director arising from his or her specifically delegated responsibilities was adversely affected by the Board's decision." *Id.* at 10a. The court indicated that, under the *Donzi Marine* rationale, the Director "may redress Board decisions that adversely affect the Director's legitimate administrative interests. * * * For example, if a Board decision substantially augmented the nature of the administrative duties delegated to the Director, increased the Director's necessary expenditure of administrative resources, or created confusion as to how the Director was to carry out specific functions, the Director's responsibilities under the LHWCA would be bound up sufficiently with the merits of the appeal to evidence a cognizable administrative injury." *Id.* at 11a, citing *Donzi Marine*, 586 F.2d at 381-382.

The court of appeals noted that it had adopted the logic of *Donzi Marine* in *Director, OWCP* v. *Newport News Shipbuilding & Dry Dock Co. (Langley)*, 676 F.2d 110 (4th Cir. 1982), where it had questioned whether "the Board's decision sufficiently implicated an administrative or economic interest of the Director so as to give rise to a redressable injury." Pet. App. 13a. The court treated its decision in *Langley* as holding that the Director had standing because of his interest in

protecting the fiscal integrity of the special fund. *Ibid.*, citing 676 F.2d at 114.[4]

The court concluded that the Director had standing to seek review of the portions of the Board's decision that would result in increased payments from the special fund administered by the Director (see note 3, *supra*), but did not have standing to appeal the issue of the degree of the claimant's disability during the period in question. The court reasoned that although the Director contended that the Board misapprehended the LHWCA's requirements, the Board's conclusion as to when the claimant's disability became partial neither altered the Director's ability to carry out her responsibilities under the LHWCA nor affected the fiscal integrity of the special fund. Pet. App. 13a-14a.[5]

SUMMARY OF ARGUMENT

The standing of the Director of the Office of Workers' Compensation Programs to seek judicial review under 33 U.S.C. 921(c), as a person "adversely affected or aggrieved" by a final order of the Benefits Review Board (Board) in compensation claim cases under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* (LHWCA), is not limited to issues that directly affect the Director's pecuniary interest or

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[4] The court below also noted its own prior holding that the Director is not a proper respondent to a petition for review under 33 U.S.C. 921(c). Pet. App. 12a n.2 (citing *I.T.O. Corp.* v. *Benefits Review Bd.*, 563 F.2d 646, 648 (4th Cir. 1977) (en banc), reinstating in pertinent part 542 F.2d 903 (1976), vacated and remanded, 433 U.S. 904 (1977)). But see note 9, *infra* (other court of appeals holdings that Director is proper respondent).

[5] The court denied the Director's petition for rehearing and suggestion of rehearing en banc on the standing issue. Two judges voted to rehear the case en banc. Pet. App. 25a-26a.

disrupt a specific administrative function. Through the LHWCA, Congress conferred broad administrative and enforcement responsibilities on the Director, which give the Director a significant stake in the correct interpretation of the Act and its consistent application. The elimination of uncertainties and inconsistencies in the Act's implementation is important to the overall efficiency of the administrative claims process. It enhances the Director's ability to fulfill her responsibilities to ensure that the Act achieves its social welfare goals. Congress also imposed on the Director specific legal duties to participate directly in the claim adjudication process and to assist claimants, thereby vesting the Director with legally cognizable interests with regard to the correctness of claim determinations. The history of the LHWCA (including the Black Lung Benefits Act, in which Congress generally incorporated the LHWCA procedures) confirms that Congress intended for the Director to have standing to obtain judicial review of any allegedly erroneous Board determinations of claims.

ARGUMENT

THE STANDING OF THE DIRECTOR OF THE OFFICE OF WORKERS' COMPENSATION PROGRAMS TO PETITION FOR JUDICIAL REVIEW OF DECISIONS BY THE BENEFITS REVIEW BOARD IS NOT LIMITED TO DECISIONS THAT AFFECT THE DIRECTOR'S PECUNIARY INTEREST OR DISRUPT HER PERFORMANCE OF SPECIFIC ADMINISTRATIVE FUNCTIONS

The Constitution of the United States limits the jurisdiction of federal courts to "Cases" and "Controversies." Art. III, § 2. An essential element of the case-

or-controversy requirement of Article III is standing. *Lujan* v. *Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992). The standing doctrine ensures that "questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982); see also *Lujan* v. *Defenders of Wildlife*, 112 S. Ct. at 2136.

The question whether a person has standing to sue has traditionally been framed as "[w]hether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy." *Sierra Club* v. *Morton*, 405 U.S. 727, 731 (1972). This requirement ensures that "the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." *Id.* at 732 (quoting *Flast* v. *Cohen*, 392 U.S. 83, 101 (1968)). Although Congress "may not confer jurisdiction on Art. III federal courts to render advisory opinions, * * * or to entertain 'friendly' suits, * * * or to resolve 'political questions,' * * * because suits of this character are inconsistent with the judicial function under Art. III," Congress may create legally protected interests not present at common law, which in turn give rise to standing. *Sierra Club* v. *Morton*, 405 U.S. at 732 n.3. "The actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" *Warth* v. *Seldin*, 422 U.S. 490, 500 (1975) (quoting *Linda R. S.* v. *Richard D.*, 410 U.S. 614, 617 n.3 (1973), and citing *Sierra Club* v. *Morton*, 405 U.S. at 732)). Moreover, "the question whether the litigant is a 'proper party to request an adjudication of a particular issue,' * * * is

one within the power of Congress to determine." *Id.* at 732 n.3 (quoting *Flast* v. *Cohen*, 392 U.S. at 100).

A party asserting standing must establish (1) that she suffered a concrete and actual invasion of a legally protected right (an "injury in fact"), (2) that there is a causal connection between the injury and the conduct complained of, and (3) that it is likely that the injury will be redressed by a favorable decision. *Lujan* v. *Defenders of Wildlife*, 112 S. Ct. at 2136. The instant case concerns the court of appeals' conclusion that petitioner did not establish that she suffered an injury in fact.[6]

Congress permits "[a]ny person adversely affected or aggrieved by a final order of the Board [to] obtain a review of that order in the United States court of appeals." 33 U.S.C. 921(c). As the court of appeals noted, Section 21(c) of the Longshore and Harbor Workers' Compensation Act thereby codifies, in effect, the Article III threshold requirement that a person have suffered an injury in fact, economic or otherwise, in order to have standing to appeal. Pet. App. 9a & n.1. Thus, the question for the Court is whether the Director has a stake in the adjudication of compensation claims under

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[6] The other two factors necessary to establish standing are present in this case. There is a causal connection between the allegedly erroneous determination of the claimant's compensation and the injury to the Director's interests under the Act (including ensuring fair compensation to claimants, payment by employers, and accurate claim adjudications). The Director's injury will be redressed by a judicial ruling correcting the erroneous compensation determination, which would yield an order that the claimant be accurately compensated through additional payments. And the compensation dispute is "otherwise justiciable" because the interests of respondent and the claimant are adverse as well. See *Sierra Club* v. *Morton*, 405 U.S. at 731.

the Act sufficient to give her standing to seek judicial review of an allegedly erroneous ruling by the Board.

Congress authorized the Director to participate in appeals of Board decisions to the courts of appeals under 33 U.S.C. 921(c), by providing that the Secretary shall appoint attorneys to represent him in "any court proceedings under section 921." 33 U.S.C. 921a. Congress did not indicate an intent to limit such participation only to issues that directly affect the Secretary's pecuniary interest or disrupt a specific administrative function, as the court of appeals held. Rather, through the Act, Congress imposed a variety of legal duties on the Director that give her a significant stake in the outcome of claim adjudications and vest her with standing to seek review of erroneous rulings in the adjudication process.

A. The Text And Structure Of The Longshore And Harbor Workers' Compensation Act Indicate That Congress Gave The Director A Stake In Claim Adjudications And Vested Her With Standing To Obtain Judicial Review Of Erroneous Benefits Review Board Rulings

1. The Act Confers Broad Administrative And Enforcement Duties On The Director

In concluding that the Director did not establish an "injury in fact" with regard to her appeal of the partial disability issue (Pet. App. 14a), the court of appeals failed to recognize that the Director participates in this litigation "not as a private individual in any sense, but as the authorized representative of the Department of Labor" who is entrusted with responsibility for the administration of the LHWCA. *Director, OWCP* v. *Eastern Coal Corp.*, 561 F.2d 632, 646 (6th Cir. 1977). The Director's interest is analogous not to that of private parties, but rather to that of other government officials carrying out their public duties under particular statutes. See, *e.g.*, *United States ex rel. Chapman* v. *Federal Power Comm'n*, 345 U.S. 153, 155-156 (1953); *SEC* v. *United States Realty & Improvement Co.*, 310 U.S. 434, 460 (1940); *Coleman* v. *Miller*, 307 U.S. 433, 441-442 (1939); *In re Debs*, 158 U.S. 564, 584-586 (1895); *United States* v. *Federal Maritime Comm'n*, 694 F.2d 793, 800-802 (D.C. Cir. 1982); *United States* v. *Federal Maritime Comm'n*, 655 F.2d 247, 251-252 (D.C. Cir. 1980); cf. *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico*, 458 U.S. 592, 607 (1982) (State has parens patriae standing based on the health and well being of its residents in general).

Congress conferred on the Director the broad responsibility of administering the Act, including the authority to make expenditures, appoint personnel, and issue any necessary rules and regulations. 33 U.S.C. 939(a).[7] Congress also conferred enforcement authority

[7] The Secretary promulgated regulations that interpret the Act as granting the Director standing to participate at all stages of the claim adjudication process, including appeals from the Board to the court of appeals. The Director, through the Solicitor of Labor or his designee, may participate in ALJ hearings as an "interested party." 20 C.F.R. 702.333(b). The Director may appeal to the Board as a "party in interest" from ALJ decisions or orders with respect to claims for compensation or benefits arising under the Act. See 33 U.S.C. 921(b)(3); 20 C.F.R. 801.102, 802.201. The terms "party" and "party in interest" are defined to mean "the Secretary or his designee and any person or business entity directly affected by the decision or order from which an appeal to the Board is taken." 20 C.F.R. 801.2(a)(10); see also 20 C.F.R. 802.201(a)(1) (specifying that "[t]he Director, OWCP, when acting as a representative of the Special Fund * * * or, when appealing

on the Director, including authority for district directors to bring actions in district court to enforce compensation awards. 33 U.S.C. 921(d). The Director has been recognized to be the policymaking authority whose views on questions of statutory and regulatory interpretation are entitled to deference from the courts. See *Director, OWCP* v. *General Dynamics Corp.*, 982 F.2d 790, 795 (2d Cir. 1992); *Zapata Haynie Corp.* v. *Barnard*, 933 F.2d 256, 258 (4th Cir. 1991); *Newport News Shipbuilding & Dry Dock Co.* v. *Howard*, 904 F.2d 206, 208 (4th Cir. 1990); *Boudreaux* v. *American Workover, Inc.*, 680 F.2d 1034, 1046 (5th Cir. 1982) (en banc), cert. denied, 459 U.S. 1170 (1983); see also *Potomac Elec. Power Co.* v. *Director, OWCP*, 449 U.S. 268, 278 n.18 (1980) (Board is not a policymaking agency and its interpretations are not entitled to special deference from the courts);[8] cf. *Mullins Coal Co.* v. *Director, OWCP*, 484 U.S. 135, 159-160 (1987) (Director's construction of analogous Black Lung Benefits Act (BLBA), 30 U.S.C. 901 *et seq.*, is entitled to deference); *Martin* v. *OSHRC*,

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a decision or order which affects the administration of one of the Acts, shall be considered a party adversely affected"). The regulations further provide that a "party adversely affected or aggrieved" by a Board decision may seek judicial review in the court of appeals. 20 C.F.R. 802.410(a). The term "party adversely affected or agrieved" includes the Director when the Board's decision is adverse to her position (cf. 20 C.F.R. 802.201(a)(1)), and indeed the regulations specifically provide that the Director, as the designated official "responsible for the administration and enforcement" of the Act, "shall be deemed to be the proper party on behalf of the Secretary of Labor in all review proceedings" in the courts of appeals. 20 C.F.R. 802.410(b).

[8] But see *Sea-Land Serv., Inc.* v. *Rock*, 953 F.2d 56, 59 (3d Cir. 1992); *American Ship Bldg. Co.* v. *Director, OWCP*, 865 F.2d 727, 730 (6th Cir. 1989) (neither Board nor Director is entitled to special deference).

499 U.S. 144, 154 (1991) (deference should be given to Secretary's interpretation of regulation promulgated under Occupational Safety and Health Act, rather than to interpretation by Occupational Safety and Health Review Commission).

By charging the Director with the responsibility for administering and enforcing the compensation system, Congress gave the Director a material interest in ensuring that the Act is construed and applied in a manner consistent with Congress's intent. In creating the LHWCA benefits scheme, Congress did far more than provide for adjudication and vindication of private claims. Congress established the Act to serve as a workers' compensation system. Therefore, it has many of the elements of social insurance, and as such is designed to promote the public interest:

> [T]he entire [workers'] compensation system has been set up and paid for, not by the parties, but by the public. The public has ultimately borne the cost of compensation protection in the price of the product, and it has done so for the specific purpose of avoiding having the disabled victims of industry thrown on private charity or public relief.

3 A. Larson, *The Law of Workmen's Compensation* § 82.41 (1994); 1 *id.* § 1.20 ("like social insurance, but unlike tort, the right to benefits and amount of benefits are based largely on a social theory of providing support and preventing destitution, rather than settling accounts between two individuals according to their personal deserts or blame"); see *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 268 (1977) (LHWCA is remedial legislation that "must be liberally construed in conformance with its purpose, and in a way

which avoids harsh and incongruous results," quoting *Voris* v. *Eikel*, 346 U.S. 328, 333 (1953)).

Ensuring "adequate workmen's compensation benefits" under the Act is "not only essential to meeting the needs of the injured employee and his family, but, by assuring that the employer bears the cost of unsafe conditions, serves to strengthen the employer's incentive to provide the fullest measure of on-the-job safety." H.R. Rep. No. 1441, 92d Cong., 2d Sess. 1 (1972). The Director has important administrative and enforcement responsibilities to further those purposes, and these responsibilities give her standing to petition for review of a Board decision. S. Rep. No. 1125, 92d Cong., 2d Sess. 15 (1972). Cf. *General Tel. Co.* v. *EEOC*, 446 U.S. 318, 326 (1980) (EEOC vindicates public interest as well as private rights in eliminating employment discrimination); *Secretary of Labor* v. *Fitzsimmons*, 805 F.2d 682, 692-693 (7th Cir. 1986) (en banc) (Secretary's interest in bringing an enforcement action under the Employee Retirement Income Security Act is based not only on the duty of protecting individual beneficiaries of specific pension programs, but also on the public interest in protecting "the very integrity, heart and lifeline of the program itself"); *Donovan* v. *University of Texas at El Paso*, 643 F.2d 1201, 1208 (5th Cir. 1981) (Secretary sues to protect public interest under Fair Labor Standards Act).

The Director's statutorily created role confers on her the ability to advance in federal court the public interest in ensuring adequate compensation payments to claimants. Cf. *Heckman* v. *United States*, 224 U.S. 413, 437-444 (1912); *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 473-474 (1976); *Pasadena City Bd. of Educ.* v. *Spangler*, 427 U.S. 424, 430-431 (1976). Moreover, incorrect claim determinations by the Board

frustrate the Director's duty to administer and enforce the statutory scheme in a uniform manner. The Director is thwarted in her duty to enforce compensation orders that further the purpose of the Act to fairly compensate employees and appropriately charge employers.

Erroneous Board rulings also impair the Director's efficient administration of the statutory program by undermining her authority to resolve compensation disputes without recourse to formal hearings (see 33 U.S.C. 914, 919(c); 20 C.F.R. 702.301 *et seq.*). To preclude the Director from obtaining judicial review of what she believes are erroneous Board rulings would reduce the incentive for employers to view the Director's informal resolution efforts as authoritative, because the employer could proceed to a higher level of review from which the Director could not appeal. Incorrect Board decisions also harm the Director's ability efficiently to administer and enforce the Act because differences between the Board and the Director are perpetuated without assurance of an avenue for judicial resolution.

Such impairments of the Director's ability to fulfill her statutory duties cause her injury in fact. The Director thus stands as a "person adversely affected or aggrieved" by the Board's erroneous ruling in this case, who has standing to petition for judicial review under 33 U.S.C. 921(c). See *Shahady* v. *Atlas Tile & Marble Co.*, 673 F.2d 479, 483 (D.C. Cir. 1982) (Director's standing to petition under 33 U.S.C. 921(c) arises out of her "general supervisory and enforcement interest" under the LHWCA); *Director, OWCP* v. *National Van Lines, Inc.*, 613 F.2d 972, 977 n.6 (D.C. Cir. 1979), cert. denied, 448 U.S. 907 (1980); *Director, OWCP* v. *Bethlehem Steel Corp.*, 949 F.2d 185, 186-187 (5th Cir. 1991) (Director has standing, based in part on substantial responsibilities of

her office and need for national uniformity, to challenge Board ruling as to when total disability becomes partial disability); *Curtis* v. *Schlumberger Offshore Serv., Inc.*, 849 F.2d 805, 807 n.4 (3d Cir. 1988) ("the Director's supervisory and enforcement interest should be sufficient to entitle him to participate as a party; his responsibility to oversee the development of a consistent body of law in this area should not depend upon the vagaries of the parties' private, albeit adversary, interests"); cf. *Director, OWCP* v. *Rochester & Pittsburgh Coal Co.*, 678 F.2d 17, 18 n.2 (3d Cir. 1982) (Director has standing under analogous BLBA statutory scheme to petition for review of Board decision based solely on "his responsibility to ensure the proper enforcement and lawful administration of the black lung benefits program"); *Eastern Coal Corp.*, 561 F.2d at 645 (Director is "adversely affected or aggrieved" under 33 U.S.C. 921(c) "in that * * * he is seeking what he deems to be lawful administration of the [BLBA] and assisting claimants * * * whose awards of benefits have been vacated by the Benefits Review Board, as well as defending the regulations he is charged with administering").[9] Moreover, limiting the Director's

[9] In *Director, OWCP* v. *Perini N. River Assocs.*, 459 U.S. 297, 302-305 (1983), this Court noted that the courts of appeals had rejected our standing argument in *Fusco* v. *Perini N. River Assocs.*, 601 F.2d 659 (2d Cir.), vacated and remanded on other grounds, 444 U.S. 1028 (1979), reinstated on remand, 622 F.2d 1111, 1113 (1980), cert. denied, 449 U.S. 1131 (1981); *Director, OWCP* v. *Donzi Marine, Inc.*, 586 F.2d 377, 382 (5th Cir. 1978); and *I.T.O. Corp.* v. *Benefits Review Bd.*, 563 F.2d 646, 648 (4th Cir. 1977) (en banc), reinstating in pertinent part, 542 F.2d 903 (1976) (en banc), vacated and remanded, 433 U.S. 904 (1977). The Court observed that those courts had relied on statutory grounds and did not address the Article III standing issue. 459 U.S. at 302 n.9. In *Perini*, the Court concluded that "the Director has statutory authority to seek review in this Court," but that the Director "*may* not have Art. III standing to argue the merits of [the claimant's] claim because the Director's presence does not guarantee the existence of a justiciable controversy with respect to the merits of [the claimant's] coverage under the LHWCA." 459 U.S. at 304. The Court did not resolve the issue, however, because the claimant was a party respondent under the rules of this Court, and had standing to urge the Court's consideration of the merits of the court of appeals' decision. *Id.* at 304-305.

With regard to the Director's standing as a respondent in the court of appeals, the Fourth Circuit held that the Director is not a proper respondent (see note 4, *supra*), but other courts of appeals have disagreed and held that the Director is properly a respondent to a petition for review of a Board decision. *Goldsmith* v. *Director, OWCP*, 838 F.2d 1079, 1080 (9th Cir. 1988); *Thornton* v. *Brown & Root, Inc.*, 707 F.2d 149, 154 (5th Cir. 1983), cert. denied, 464 U.S. 1052 (1984); *Ingalls Shipbuilding Div., Etc.* v. *White*, 681 F.2d 275, 286-287 (5th Cir. 1982), overruled on other grounds, *Newpark Shipbuilding & Repair, Inc.* v. *Roundtree*, 723 F.2d 399 (5th Cir.) (en banc), cert. denied, 469 U.S. 818 (1984); *Shahady* v. *Atlas Tile & Marble Co.*, 673 F.2d 479 (D.C. Cir. 1982); see also *Curtis* v. *Schlumberger Offshore Serv., Inc.*, 849 F.2d 805, 807 n.4 (3d Cir. 1988) (noting strength of *Shahady* rationale, but reserving question). Some of the decisions upholding the Director's standing as a respondent are based on 33 U.S.C. 921(c) and some are based solely on Fed. R. App. P. 15(a), which provides that petitions for review of agency orders must name the agency as a respondent. *Brown & Root, Inc.*, 707 F.2d at 154; *Ingalls Shipbuilding*, 681 F.2d at 282-284.

standing, as the court of appeals did, to only issues that directly affect her pecuniary interest or disrupt a specific administrative function would lead to case-by-case adjudication regarding what constitutes injury to a specific administrative function,[10] and inject additional

[10] Compare the Fifth Circuit's ruling in *Donzi Marine*, 586 F.2d at 381-382 (although resolution of question whether employees of recreational boat industry are covered under LHWCA would allow

uncertainties and inefficiencies into the claim adjudication process.

2. Congress Imposed Specific Duties On The Director With Regard To The Claims Adjudication Process And Assisting Disabled Employees, Which Also Give The Director Standing

In addition to broad administrative and enforcement responsibilities under the Act, Congress charged the Director with certain specific legal duties that promote the public interest in achieving the Act's ocial welfare objectives by assisting claimants both in th adjudication process and thereafter. The Director hall, upon request, provide persons covered by [th Act] with information and assistance relating t the [Act's] coverage and compensation and the rocedures for

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Director to give more certain adv claimants, Director's legitimate administrative interests re ot adversely affected by Board's adverse legal ruling), with t Fifth Circuit's more recent decision in *Bethlehem Steel Corp.*, 9 F.2d at 186-187 (Director's obligation to furnish information to claimants is adversely affected by Board ruling concerning when total disability becomes partial disability, when three courts of appeals had already rejected Board's position).

At bottom, under the rationale of the court below, a court would be permitted to substitute its judgment for that of the Director regarding the impact that a Board decision has on the administration of the LHWCA, thereby leading to great unpredictability. For example, comparison of the Fifth Circuit's ruling in *Bethlehem Steel Corp.*, 949 F.2d at 186-187, and the court of appeals ruling in this case reveals a striking inconsistency. The Fifth Circuit held that the Director has standing to challenge a Board ruling as to when a total disability becomes a partial disability—an issue that is, for present purposes, analytically indistinguishable from the one the Fourth Circuit held that the Director did *not* have standing to raise in this case.

obtaining such compensation and including assistance in processing a claim." 33 U.S.C. 939(c)(1). In addition, the Director polices the legal representation provided to claimants. The Director is responsible for maintaining a list of persons not authorized to represent claimants, which requires her to determine whether such persons have engaged in misconduct or fraud with regard to prior representations. 33 U.S.C. 931. The Director also "may, upon request, provide persons covered by [the Act] with legal assistance in processing a claim." 33 U.S.C. 939(c)(1).

Congress also charged the Director with responsibility for protecting claimants' interests when their cases are resolved short of adjudication, *e.g.*, when the employer pays compensation without issuance of a formal award (33 U.S.C. 914(a)), or when the employer and employee enter into a settlement. In the case of uncontroverted payments, the Director's district director may, upon his own initiative at any time, investigate the case. 33 U.S.C. 914(h)(1), 919(c). District directors also are authorized to review settlements between employers and employees to determine if they are adequate and not procured by duress. 33 U.S.C. 908(i).

The Director has ongoing responsibility to disabled employees already receiving compensation as well. The Director actively supervises the medical care rendered to injured employees, requires periodic reports on such cases, and oversees the quality and appropriateness of the services and charges of medical care providers. 33 U.S.C. 907(b). The Act requires that the Director maintain a list of health care providers not authorized to render services under the LHWCA. 33 U.S.C. 907(c). The Director must provide claimants with "information on medical, manpower, and vocational rehabilitation

services." 33 U.S.C. 939(c). Moreover, the Director must "assist such employees in obtaining the best such services available." *Ibid.* The Director bears responsibility in some situations for directing vocational rehabilitation, furnishing prosthetic appliances, using specified funds to procure rehabilitation services, 33 U.S.C. 939(c)(2), as well as administering a special fund for payment of benefits in specified circumstances, including the supplementation of employers' payments to employees. 33 U.S.C. 908(f), 918(b), 944.

Given her broad responsibilities under the LHWCA and the societal interests inhering in them, the Director has a material interest in the consistent and fair administration and application of the LHWCA beyond the narrow range that the court of appeals acknowledged. An erroneous denial of compensation to a claimant undermines the Director's statutory interest in ensuring the adequacy of compensation payments to further the Act's purposes, including preventing claimants from otherwise burdening public benefit programs.[11] Such a denial may also impair the Director's ability to fulfill her duties to an individual claimant with regard to informal

[11] Indeed, Congress determined that the public interest in adequately compensating injured employees should not be defeated by employers' inducement of employees to surrender such compensation. The Act provides that "[n]o agreement by an employee to waive his right to compensation under this chapter shall be valid." 33 U.S.C. 915(b). The Act also invalidates any agreements by employees to contribute to an employer's benefit fund for purposes of providing compensation or medical services and supplies as required by the LHWCA. 33 U.S.C. 915(a). Any employer who makes such a deduction from the pay of an employee entitled to the benefits of the Act faces criminal prosecution. *Ibid.*

resolutions, settlement, vocational rehabilitation or other services.

By conferring this comprehensive range of public duties on the Director, Congress conferred standing on her to prosecute appeals from claim rulings that she believes have misinterpreted or misapplied the Act. Cf. *In re Columbia Gas Systems Inc.*, 33 F.3d 294, 298-299 (3d Cir. 1994) (U.S. Trustee has standing in bankruptcy case due to statutorily imposed duties to protect public interest); *Washington Utils. & Transp. Comm'n* v. *FCC*, 513 F.2d 1142, 1149-1150 (9th Cir. 1975) (state agency has standing because of duty to protect telephone users); cf. *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 476-477 (1940). By imposing on the Director a legal duty to assist claimants during the claim adjudication process, to ensure the adequacy of compensation payments, and to assist compensation recipients thereafter, Congress gave the Secretary a "sufficient stake" in the outcome of claim adjudication proceedings to press for judicial resolution of the controversy in this case. See *Sierra Club* v. *Morton*, 405 U.S. at 731; cf. *Director, OWCP* v. *Eastern Coal Corp.*, 561 F.2d at 641-648 (discussing Secretary's analogous duties under Black Lung Benefits Act).

B. The History Of The Act Confirms Congress's Intention To Confer On The Director Standing To Seek Judicial Review Of Board Rulings.

The history of the LHWCA strongly supports the conclusion that the Director has standing under 33 U.S.C. 921(c) to obtain judicial review of a Board order that incorrectly rejects a compensation claim under the Act.

1. The current procedures for adjudication of compensation claims under the LHWCA reflect substantial modifications implemented by the 1972 amendments to the Act. See Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, 86 Stat. 1251. Before those amendments, OWCP deputy commissioners conducted hearings and issued compensation orders in disputed cases. Those decisions were reviewable in an injunctive action against the deputy commissioner in district court, with further review by appeal to the court of appeals under 28 U.S.C. 1291. See *Kalaris* v. *Donovan*, 697 F.2d 376, 381-382 (D.C. Cir.), cert. denied, 462 U.S. 1119 (1983). The deputy commissioner was denominated as a respondent in such district court proceedings. See former Section 21(b), 44 Stat. 1436 (1927) (codified at 33 U.S.C. 921(b) (1970)). It was clear that the deputy commissioner had standing to appeal under 28 U.S.C. 1291 from a district court ruling enjoining his decision, even in the absence of an appeal by another party. See *Henderson* v. *Glens Falls Indem. Co.*, 134 F.2d 320 (5th Cir.), cert. denied, 319 U.S. 756 (1943).

The 1972 Amendments transferred the authority to conduct hearings from deputy commissioners (redesignated "district directors" by regulation, see note 2, *supra*) to ALJs. The Amendments also replaced district court injunctive actions with appeals to the newly created Benefits Review Board and subjected Board rulings to judicial review in the courts of appeals under Section 21(c) of the Act, 33 U.S.C. 921(c). The Board thus "performs a review function [under the new regime] identical to that which the District Courts performed" before the 1972 Amendments. *Kalaris* v. *Donovan*, 697 F.2d 376, 382 (D.C. Cir.), cert. denied, 462 U.S. 1119 (1983).

Congress could hardly have intended these changes to divest the Act's administrator of her pre-1972 authority to seek review in the courts of appeals of decisions on benefits claims that are adverse to her position. Cf. *Shahady*, 673 F.2d at 485; *Eastern Coal Corp.*, 561 F.2d at 649 ("[w]e do not find in the [1972 Amendments] any Congressional intention * * * to compel the Secretary or his duly designated representative to accept [Board decisions] without recourse to the courts when he conscientiously disagrees"). That result would be directly at odds with a major purpose of the 1972 Amendments, which was to augment the Director's responsibilities. See S. Rep. No. 1125, *supra*, at 13-14 (placing responsibility for hearings with ALJs will better enable deputy commissioners to perform their administrative responsibilities under the Act); see generally *id.* at 14-15 (Amendments were intended to ensure Director's active involvement at all stages of claim-processing under LHWCA). The 1972 Amendments specifically increased the Director's responsibility for providing services to employees by requiring her to provide assistance to them in processing a claim. H.R. Rep. No. 1441, *supra*, at 12. This amendment was intented to ensure that the "assistance be all inclusive and enable the employee to receive the maximum benefits due to him without having to rely on outside assistance other than that provided by the Secretary." *Id.* at 13.[12]

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[12] Some courts have suggested that Congress intended to distinguish between administrative standing and judicial standing when it provided "part[ies] in interest" with a right to administrative review by the Board, 33 U.S.C. 921(b)(3), but provided "person[s] adversely affected or aggrieved" with a right to judicial review, 33 U.S.C. 921(c). See *I.T.O. Corp.* v. *Benefits Review Board*, 542 F.2d at 908; *Ingalls Shipbuilding Div., Etc.* v.

2. That the Director's interest in the resolution of compensation claims is sufficient to confer standing to appeal is further confirmed by the text and legislative history of the Black Lung Benefits Act (BLBA), as amended in 1978, Pub. L. No. 95-239, § 7(h), 92 Stat. 99. The BLBA generally incorporates the procedures of the LHWCA. 30 U.S.C. 932(a). This Court has recognized that "[w]hen several acts of Congress are passed touching the same subject-matter, subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject." *Marchie Tiger* v. *Western Inv. Co.*, 221 U.S. 286, 309 (1911); *Bell* v. *New Jersey*, 461 U.S. 773, 784 (1983). See also *West Virginia Univ. Hosp., Inc.* v. *Casey*, 499 U.S. 83, 100-101 (1991).

The BLBA explicitly provides that "[t]he Secretary shall be a party in any proceeding relative to [a] claim"

White, 681 F.2d 275, 287 (5th Cir. 1982), overruled on other grounds by *Newpark Shipbuilding & Repair, Inc.* v. *Roundtree*, 723 F.2d 399 (5th Cir.) (en banc), cert. denied, 469 U.S. 818 (1984); see also *White* v. *Ingalls Shipbuilding Div., Litton Sys., Inc.*, 12 Ben Rev. Bd. Serv. (MB) 905, 907 (1980). Close examination of the Act refutes that argument. The Act also employs the term "party aggrieved" when referring to administrative review proceedings. See 33 U.S.C. 921(b)(5) (any "party aggrieved" by Board decision may seek review by full Board). And the LHWCA, before the 1972 amendments, authorized "any party in interest" to seek *court* review of compensation orders. 33 U.S.C. 921(b) (1970). These disparate uses of the terms "party in interest" and person or party "aggrieved" weigh against the inference that Congress intended separate tests to apply to the Director's standing to obtain Board review and her standing to obtain judicial review. Moreover, the distinction between administrative and judicial standing is not supported by agency regulations, which employ the "adversely affected or aggrieved" standard in both contexts. See 20 C.F.R. 802.201(a), 802.410(a).

for black lung benefits. 30 U.S.C. 932(k). In 1977, the Senate Committee on Human Resources (the successor to the Committee on Labor and Public Welfare that drafted the 1972 Amendments to the LHWCA) explained that this provision reflects the intent that the Director have standing under both Acts:

> Some question has arisen as to whether the adjudication procedures applicable to black lung claims incorporating various sections of the amended Longshoremen's and Harbor Workers' Compensation Act confers standing upon the Secretary of Labor or his designee to appear, present evidence, file appeals or respond to appeals filed with respect to the litigation and appeal of claims. In establishing the Longshore Act procedures it was the intent of this Committee to afford the Secretary the right to advance his views in the formal claims litigation context whether or not the Secretary had a direct financial interest in the outcome of the case. The Secretary's interest as the officer charged with the responsibility for carrying forth the intent of Congress with respect to the Act should be deemed sufficient to confer standing on the Secretary or such designee of the Secretary who has the responsibility for the enforcement of the Act, to actively participate in the adjudication of claims before the Administrative Law Judge, Benefits Review Board, and appropriate United States Courts.

S. Rep. No. 209, 95th Cong., 1st Sess. 21-22 (1977) (emphases added). The Conference Committee adopted the Senate provisions regarding the claim adjudication procedures, specifically including the provision that "made future amendments to the Longshoremen's Act procedures automatically applicable to black lung

claims." H.R. Conf. Rep. No. 864, 95th Cong., 1st Sess. 22-23 (1978); see 30 U.S.C. 932(a).

This unambiguous expression of congressional intent to confer standing on the Secretary under the LHWCA, regardless of any pecuniary interest in a particular case, should be given considerable weight by this Court in deciding this case.[13] See *Ingalls Shipbuilding Div., Etc.* v. *White*, 681 F.2d 275, 286-287 & n. 10 (5th Cir. 1982) (1977 report accompanying BLBA amendments is persuasive extrinsic evidence of Congress's intent under 1972 LHWCA amendments), overruled on other grounds by *Newpark Shipbuilding & Repair, Inc.* v. *Roundtree*, 723 F.2d 399 (5th Cir.) (en banc), cert. denied, 469 U.S. 818 (1984). The Senate Committee's statement is of

[13] Several courts of appeals, even before the addition of 30 U.S.C 932(k), recognized the Director's standing to petition for review of Board decisions on black lung claims. See, *e.g.*, *Krolick Contracting Corp.* v. *Benefits Review Bd.*, 558 F.2d 685, 689-690 (3d Cir. 1977); *Director, OWCP* v. *National Mines Corp.*, 554 F.2d 1267, 1271-1272 (4th Cir. 1977); *Director, OWCP* v. *Alabama By-Products Corp.*, 560 F.2d 710, 717 (5th Cir. 1977); *Eastern Coal Corp.*, 561 F.2d at 646; *Director, OWCP* v. *Peabody Coal Co.*, 554 F.2d 310, 336-338 (7th Cir. 1977). Those decisions gave at least some weight to the Director's interest in obtaining reimbursement from the mine operators for benefits paid from the Black Lung Disability Trust Fund, although some of the decisions also predicated standing on the Director's other administrative functions under the BLBA. See *Eastern Coal Corp.*, 561 F.2d at 643-645; *Alabama By-Products Corp.*, 560 F.2d at 717. As noted, the Third Circuit has since accorded the Director standing, in a case in which the Director lacked such a pecuniary interest, solely because of "his responsibility to ensure the proper enforcement and lawful administration of the black lung benefits program." *Director, OWCP* v. *Rochester & Pittsburgh Coal Co.*, 678 F.2d 17, 18 n.2. (1982).

special significance in the circumstances at issue in this case because it is not an after-the-fact characterization of a prior statute; rather it is a statement about Congress's intent with regard to the manner in which a claims adjudication process is to function at the time Congress reexamined that process with regard to another benefits program that is subject to the same process. The same rules of practice and procedure before the Board (20 C.F.R. 802.101 *et seq.*) apply to claim adjudications under the LHWCA and the BLBA. To recognize the Director's standing under one Act but not the other would be inconsistent with congressional intent and would introduce unwarranted discrepancies into the implementation of the statutory mandates.

A straightforward, realistic approach to the question of the Director's standing, in light of the full measure of the Director's statutory responsibilities and in accord with the Constitution, permits the Director to petition for review of what she concludes, in the exercise of her expert judgment, to be an erroneous Board ruling in a compensation award controversy.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

LAWRENCE G. WALLACE
Deputy Solicitor General

BETH S. BRINKMANN
Assistant to the Solicitor General

THOMAS S. WILLIAMS, JR.
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

STEVEN J. MANDEL
Deputy Associate Solicitor

MARK S. FLYNN
Senior Appellate Attorney
Department of Labor

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In The

Supreme Court of the United States

October Term, 1994

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

v.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF FOR THE RESPONDENT

LAWRENCE P. POSTOL*
JAMES M. MESNARD
SEYFARTH, SHAW, FAIRWEATHER & GERALDSON
Suite 500
815 Connecticut Ave., N.W.
Washington, D.C. 20006-4004
(202) 463-2400

Counsel for Respondent, Newport News Shipbuilding & Dry Dock Company

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the Director, Office of Workers' Compensation Programs of the United States Department of Labor, has standing to petition the Courts of Appeals for review of a decision of the Department of Labor's Benefits Review Board, regardless of whether one of the Director's legally cognizable interests has been injured by the Board's decision.

PARTIES

The Petitioner is the Director, Office of Workers' Compensation Programs of the United States Department of Labor ("the Director"). The Respondent is the Newport News Shipbuilding and Dry Dock Company. The Claimant, Jackie Harcum, expressly declined to participate in the Director's appeal of the Benefits Review Board's decision to the United States Court of Appeals for the Fourth Circuit and he is not participating in this proceeding.

CORPORATE AFFILIATIONS

The Newport News Shipbuilding and Dry Dock Company is a wholly owned subsidiary of Tenneco, Incorporated.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES ii

TABLE OF AUTHORITIES v

STATUTORY AND REGULATORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

A. The Workers' Compensation Framework 2

B. The Pending Workers' Compensation Claim .. 10

SUMMARY OF THE ARGUMENT 18

ARGUMENT 21

I. THE DIRECTOR DOES NOT HAVE STANDING TO OBTAIN REVIEW OF A BOARD DECISION WHERE SHE IS NOT ADVERSELY AFFECTED OR AGGRIEVED BY THE BOARD'S ORDER .. 21

A. Only Those Persons Who Have Suffered An Injury In Fact To A Legally-Protected Interest Have Standing To Invoke The Jurisdiction Of Federal Courts 21

B. The Longshore Act Does Not Authorize The Director, On Behalf Of The Secretary Of Labor, To Seek Review Of Board Decisions Adjudicating Claims Between Private Parties. To The Contrary, The 1972 Longshore Amendments Made Clear Congress' Decision to Separate The Administrative Function From the Adjudicatory Process 23

TABLE OF CONTENTS – Continued

Page

C. The Director's Mere Status As Administrator Of The Longshore Act Does Not Make Her Adversely Affected Or Aggrieved By Every Board Decision. The Secretary Is A Neutral Administrator, And Is An Advocate For Neither Claimants Nor Employers 25

D. The Enforcement Duties Conferred On The Director Are Extremely Narrow And Do Not Even Concern The Adjudication Of Contested Claims Between Covered Workers And Their Employers..... 32

E. The Legislative History And Decisions Interpreting The Black Lung Benefits Act Are Not Relevant In This Case Because That Statute, Unlike The Longshore Act, Explicitly Makes The Secretary Of Labor A Party To Every Claim, And Under The Black Lung Act, The Secretary Defends Against The Claim Or Is Involved In Determining The Responsible Operator 34

II. THE DIRECTOR DOES NOT HAVE ARTICLE III STANDING BECAUSE THIS CASE INVOLVES ONE DELEGATE OF THE SECRETARY OF LABOR SEEKING REVIEW OF AN ADMINISTRATIVE ADJUDICATION BY ANOTHER DELEGATE OF THE SECRETARY 36

III. SECTION 21(c) OF THE LONGSHORE ACT DOES NOT CONFER STANDING ON THE DIRECTOR 38

CONCLUSION 40

APPENDIX 1a

TABLE OF AUTHORITIES

Page

CASES

Bowen v. Georgetown Univ. Hospital, 488 U.S. 204 (1988) 24

Director, OWCP v. Donzi Marine, Inc., 586 F.2d 377 (5th Cir. 1978).....16, 31

Director, OWCP v. Greenwich Collieries, ___ U.S. ___, 114 S.Ct. 2251 (1994) 27

Director, OWCP v. National Van Lines, Inc., 613 F.2d 972 (D.C. Cir. 1979), *cert. denied*, 448 U.S. 907 (1980) 23

Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. (Langley), 676 F.2d 110 (4th Cir 1982).....3, 17, 31

Director, OWCP v. Perini North River Assoc., 459 U.S 297 (1983).....22, 26

Donovan v. University of Texas at El Paso, 643 F.2d 1201 (5th Cir. 1981)..... 34

Estate of Cowart v. Nicklos Drilling Co., ___ U.S. ___, 112 S.Ct. 2589 (1992) 27, 29, 30, 39

Flast v. Cohen, 392 U.S. 83 (1968).....21, 28

General Tel. Co. v. EEOC, 446 U.S. 318 (1980) 34

Gladstone Realtors v. Village of Bellwood, 441 U.S. 91 (1979) 22

Helen Mining Co. v. Director, OWCP, 924 F.2d 1269 (3d Cir. 1991) 35

Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants, 17 F.3d 130 (5th Cir. 1994)..... 5

I.T.O. Corp. v. BRB, 563 F.2d 646 (4th Cir. 1977), *reinstating in pertinent part*, 542 F.2d 903 (4th Cir. 1976), *vacated and remanded*, 433 U.S. 904 (1977) 17

TABLE OF AUTHORITIES – Continued

Page

Kalaris v. Donovan, 697 F.2d 376 (D.C Cir.), *cert. denied*, 462 U.S. 1119 (1983) 24, 37

Lujan v. Defenders of Wildlife, ___ U.S. ___, 112 S.Ct. 2130 (1992) 21, 22, 37

Morrison-Knudsen Constr. Co. v. Director, OWCP, 461 U.S. 624 (1983) 4, 27, 29, 30

New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031 (5th Cir. 1981) 16

Newport News Shipbuilding & Dry Dock Co. v. Tann, 841 F.2d 54 (4th Cir. 1988) 11, 14

Potomac Elec. Power Co. v. Director, OWCP, 449 U.S 268 (1980) 2, 3, 27, 39

Roger's Terminal & Shipping Corp. v. Director, OWCP, 784 F.2d 687 (5th Cir.), *cert. denied*, 479 U.S. 826 (1986) 16

Ryan-Walsh Stevedoring Co., Inc. v. Trainer, 601 F.2d 1306 (5th Cir. 1979) 22, 24, 37

Secretary of Labor v. Fitzsimmons, 805 F.2d 682 (7th Cir. 1986) 34

Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26 (1976) 38

Stevens v. Lockheed Shipbuilding Co., 22 B.R.B.S 155 (1989), *rev'd in pert. part sub nom., Stevens v. Director, OWCP*, 909 F.2d 1256 (9th Cir 1990), *cert. denied*, 498 U.S. 1073 (1991) 12

TABLE OF AUTHORITIES – Continued

Page

Trans-State Dredging v. BRB, 731 F.2d 199 (4th Cir 1984) 16

Valley Forge Christian College v. Americans United For Separation of Church and State, Inc., 454 U.S 464 (1982) 22

Warth v. Seldin, 422 U.S. 490 (1975) 21, 22

CONSTITUTION, STATUTES AND REGULATIONS:

U.S. Const. Art. III ..... *passim*

Administrative Procedure Act, 5 U.S.C. § 554, *et seq* 5

Federal Mines Safety and Health Act of 1977, as amended Black Lung Benefits Act,

30 U.S.C. § 901 *et seq* 8, 34, 35, 36

30 U.S.C. § 932(k) 9, 35

30 U.S.C. § 934(b) 35

Longshore and Harbor Workers' Compensation Act,

33 U.S.C. § 901 *et seq* ..... *passim*

33 U.S.C. § 902(1) (§ 2(1)) 1, 6, 23, 38

33 U.S.C. § 902(2) 2

33 U.S.C. § 902(3) 2

33 U.S.C. § 902(6) (§ 2(6)) 1, 6, 23, 38

33 U.S.C. § 904(a) 4

33 U.S.C. § 907 3

33 U.S.C. § 908(b) 11

TABLE OF AUTHORITIES – Continued

Page

33 U.S.C. § 908(c)(21) 11
33 U.S.C. § 908(e) 11
33 U.S.C. § 908(f)(§ 8(f)) 3, 12
33 U.S.C. § 908(h) 11
33 U.S.C. § 914(d) 4
33 U.S.C. § 918(b) 32
33 U.S.C. § 919 ..... 3, 8
33 U.S.C. § 919(c) 3, 5
33 U.S.C. § 919(d) 5
33 U.S.C. § 921a (§ 21a) 1, 9
33 U.S.C. § 921(b) 1, 8
33 U.S.C. § 921(b)(1) 22, 24, 37
33 U.S.C. § 921(b)(3) 6
33 U.S.C. § 921(b)(4) (§ 21(b)(4)) 9, 16
33 U.S.C. § 921(c) (§ 21(c)) ..... *passim*
33 U.S.C. § 921(d) 1, 4, 33
33 U.S.C. § 928 ..... 7, 29
33 U.S.C. § 928(d) 7
33 U.S.C. § 928(e) 7
33 U.S.C. § 939(a) 1, 3
33 U.S.C. § 939(c) 1, 3, 29
33 U.S.C. § 941 3

TABLE OF AUTHORITIES – Continued

Page

33 U.S.C. § 941(b)(5) 4, 33
33 U.S.C. § 944 ..... 3, 17
33 U.S.C. § 944(a) 31
33 U.S.C. § 944(d) 33
33 U.S.C. § 944(d)(1) 4
33 U.S.C. § 944(d)(3) 4

Longshoremen's and Harbor Workers' Compensation Act, § 21(b), 44 Stat. 1436 (1927) 7, 9

Longshoremen's and Harbor Workers' Compensation Act, Amendments of 1972, 86 Stat. 1251 (1972) 19, 25, 28

20 C.F.R.:

Section 701.201 ..... 2, 4, 9, 37
Section 701.202(a) 37
Section 701.301(a)(7) 4
Section 702.105 4
Section 702.132 7
Section 702.133 7
Section 702.134 7
Section 702.135 7
Section 702.202 2
Section 702.251 4
Section 702.252 4

TABLE OF AUTHORITIES – Continued

Page

Section 702.301 4
Section 701.311 4
Section 701.312 4
Section 701.313 4
Section 702.315 5
Section 702.316 5
Section 702.317 5
Section 702.332 5
Section 702.333 2
Section 702.333(a) 5
Section 702.333(b) 5
Section 725.420 35
Section 725.490 35
Section 725.522 35
Section 801.102 2
Section 801.103 ..... 24, 27
Section 801.2(10) 6
Section 801.201 ..... 24, 37
Section 801.201(a)(1) 24
Section 802.410 ..... 2, 6, 24

MISCELLANEOUS:

H. Rep. No. 92-1441, 92nd Congress, 2nd Sess. (1972), reprinted in 1972 U.S.C.C.A.N. 4698 8

No. 93-1783

In The

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October Term, 1994

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

v.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF FOR THE RESPONDENT

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent provision of the United States Constitution is reprinted in the Appendix to this Brief. Pertinent provisions of the Longshore and Harbor Workers' Compensation Act (33 U.S.C. §§ 921(b), 921(c), 921(d), 921a, 939(a), 939(c)) are reprinted in the Appendix to the Petition for a Writ of Certiorari (Pet. App. at 63a-66a). Additional pertinent statutory provisions (33 U.S.C. §§ 902(1),(6)) are reprinted in the Appendix to this Brief.

Pertinent provisions of the Department of Labor regulations (20 C.F.R. §§ 701.201, 701.202, 702.333, 801.102, 802.410) are reprinted at Pet. App. at 67a-68a.

STATEMENT OF THE CASE

A. The Workers' Compensation Framework

This case arises under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* ("the Longshore Act" or "the Act"). The Act is a workers' compensation statute. As such, it provides compensation and medical treatment for covered employees who sustain injuries "arising out of and in the course of employment." 33 U.S.C. §§ 902(2), (3). Like all workers' compensation statutes, the Longshore Act is a compromise. It imposes strict liability upon covered employers for work-related injuries. In return, the Act establishes "definite and lower limits on potential liability than would have been applicable in common-law tort actions for damages." *Potomac Elec. Power Co. v. Director, OWCP*, 449 U.S. 268, 281 (1980).

Generally, the employee receives two-thirds of his lost wages or a scheduled award, and medical treatment. Thus, the Act is not social welfare insurance. Rather, as this Court has noted, the Longshore Act is a compromise between the competing interests of employers and claimants: "It therefore is not correct to interpret the Act as guaranteeing a completely adequate remedy for all covered disabilities. Rather, like most workmen's compensation legislation, the LHWCA represents a compromise between the competing interests of disabled laborers and

their employers." *Potomac Elec. Power Co. v. Director, OWCP*, 449 U.S. at 282. (footnote omitted)

Congress authorized the Secretary of Labor ("the Secretary") to administer the Act and to promulgate the regulations necessary to carry out that delegation of authority, in much the same way any agency is empowered to administer the programs entrusted to it. *See* 33 U.S.C. § 939(a). Like most other agencies, for example, the adjudication of claims is subject to the Administrative Procedure Act. 33 U.S.C. § 919(c). Congress also specifically delineated the responsibilities encompassed within the Secretary's administrative duties. The Secretary is authorized to provide legal information and assistance to injured employees in processing their claims for benefits. He is also empowered to provide information and to assist employees in obtaining medical and vocational rehabilitation services. 33 U.S.C. § 939(c). Congress authorized the Secretary to promulgate and enforce rules and regulations to protect the safety of covered employees, 33 U.S.C. § 941, to supervise the medical care of injured employees, 33 U.S.C. § 907, and to establish a procedure for processing compensation claims, 33 U.S.C. § 919. The Act also imposes on the Secretary the duty to protect the interests of the Special Fund established to partially relieve employers from liability for permanent disabilities which are contributed to by pre-existing permanent disabilities. *See* 33 U.S.C. §§ 908(f), 944; *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. (Langley)*, 676 F.2d 110, 113-14 (4th Cir. 1982).

The Secretary delegated his administrative duties to the Director, Office of Workers' Compensation Programs

("the Director").[1] *See* 20 C.F.R. § 701.201. Congress also delegated a few narrowly drawn enforcement responsibilities to the Secretary, and thus, to the Director. 33 U.S.C. §§ 921(d), 941(b)(5), 944(d)(1), (3).

The Director's duties under the Act, however, are almost entirely ministerial. The Act is a workers' compensation statute, and the vast majority of claims for benefits under the Act are paid by employers or insurers voluntarily and in a timely manner.[2] The Act requires an employer that contests an employee's right to compensation to affirmatively controvert the claim within 14 days after being notified of the injury on a form prescribed by the Director. 33 U.S.C. § 914(d); 20 C.F.R. § 702.251. Upon receipt of a notice of controversion, the District Director initiates the adjudication mechanism. 20 C.F.R. § 702.252.

The first step is an informal conference scheduled and convened by the District Director. 20 C.F.R. §§ 702.301, 702.311-313. The District Director may make a recommendation for resolution of the claim based on information presented at the conference. The recommendation is not, however, binding on either the claimant or

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[1] These duties are actually carried out by District Directors, formerly called Deputy Commissioners, appointed by the Secretary. 33 U.S.C. § 904(a); 20 C.F.R. §§ 701.301(a)(7), 702.105.

[2] In *Morrison-Knudsen Constr. Co. v. Director, OWCP*, 461 U.S. 624, 637 (1983), this Court observed that a 1982 report by the Comptroller General of the United States stated that 95% of all lost-time injuries are compensated immediately without referral of the claim to an Administrative Law Judge.

the employer. 20 C.F.R. § 702.316. The informal conference is merely an attempt to resolve any outstanding issues without resort to a formal hearing.

If the claimant and employer reach agreement on all issues, the District Director may enter a compensation order pursuant to that agreement. 20 C.F.R. § 702.315. The District Director does not, however, have authority to enter a compensation order absent the private parties' agreement. If agreement on all contested issues is not achieved, either the claimant or the employer may request a formal hearing. 20 C.F.R. § 702.316. The District Director must transfer the claim to the Department of Labor's Office of Administrative Law Judges upon receipt of a request for a hearing. 33 U.S.C. § 919(c); 20 C.F.R. § 702.317. The District Director has no discretion to do otherwise. *Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants*, 17 F.3d 130 (5th Cir. 1994).

Contested claims are heard by Administrative Law Judges from the Department of Labor in accordance with the Administrative Procedure Act, 5 U.S.C. § 554 *et seq.* ("APA"). 33 U.S.C. § 919(d); 20 C.F.R. 702.332. The regulations provide that the claimant and employer or workers' compensation insurance carrier are necessary parties. 20 C.F.R. § 702.333(a). The regulations, but not the statute, provide that the Solicitor of Labor may appear and participate before the Administrative Law Judge as an interested party on behalf of the Director. 20 C.F.R. § 702.333(b). The Director is not, however, a necessary party.

The decisions of Administrative Law Judges may be appealed to the Department of Labor's Benefits Review

Board ("the Board"). The Longshore Act states that any party in interest may appeal substantial questions of law or fact to the Board. 33 U.S.C. § 921(b)(3). Similarly, the regulation governing Board proceedings defines the term "party in interest" as including "the Secretary [of Labor] or his designee and any person or business entity directly affected by the decision or order from which an appeal to the Board is taken." 20 C.F.R. § 801.2(10). Neither the statutory language nor the implementing regulations require that a party be adversely affected or aggrieved in order to prosecute an appeal before the Board. Status as a party in interest is sufficient.

The authority to seek review of a Board order before the Courts of Appeals is more limited. Section 21(c) of the Act authorizes only those persons "adversely affected or aggrieved by a final order of the Board" to obtain review in the Courts of Appeals. 33 U.S.C. § 921(c). The term "person" is defined as an "individual, partnership, corporation, or association." 33 U.S.C. § 902(1). While the term "Secretary" is defined in the Act, neither the Secretary nor the Director is by name included in the definition of a "person." *See* 33 U.S.C. § 902(1), (6). The Secretary's regulations designate the Director as the Secretary's representative in all review proceedings before the Courts of Appeals. 20 C.F.R. § 802.410. Nevertheless, the Director's standing to seek review of a Board decision is derivative of the Secretary's standing. The Act limits standing to only those *persons* adversely affected or aggrieved by a Board order, and the Secretary is not named in the definition of the term "person."

The Longshore Act clearly establishes a framework for resolving contested claims between private parties

(the claimant and the employer or insurer). The Act even provides for payment of successful claimants' attorney's fee and expenses by the employer or insurance carrier.[3] 33 U.S.C. § 928. The Act does not, however, authorize the Director to seek review of decisions of the Board in the Courts of Appeals on behalf of either private party in a contested workers' compensation claim.

A review of the legislative development of the Longshore Act is helpful in understanding why the Director's appeal of a Benefits Review Board decision was never envisioned by Congress, at least where the Secretary has no injury in fact as required by Article III. When the Longshore Act was originally enacted in 1927, the Deputy Commissioners (now called District Directors) served both as administrators and as claims adjudicators. The Deputy Commissioners decided contested claims, and the claimant or employer could appeal by seeking an injunction in the appropriate United States District Court against the Deputy Commissioner. *See* former Section

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[3] If a covered employee utilizes an attorney to prosecute a controverted claim, and the employee is successful in obtaining benefits, the employer or insurance carrier is responsible for payment of reasonable attorneys fees directly to the claimant's attorney. 33 U.S.C. § 928(e); 20 C.F.R. § 702.134. The employer or carrier is also responsible for payment of the claimant's attorney's costs, including expert witness fees. 33 U.S.C. § 928 (d); 20 C.F.R. § 702.135. An attorney seeking a fee award must file a fee petition with the District Director, Administrative Law Judge or Court before whom the services are performed. 33 U.S.C. § 928; 20 C.F.R. § 702.132. Acceptance of a fee which has not been approved is a crime punishable by imprisonment for not more than one year and a $1000 fine. 33 U.S.C. § 928(e); 20 C.F.R. § 702.133.

21(b), 44 Stat. 1436 (1927). Since the Deputy Commissioner was the defendant in the federal action, section 21a of the Longshore Act allowed United States Attorneys to defend the Deputy Commissioner in such proceedings. *See* former Section 21(a), 45 Stat. 490 (1928).

In considering the 1972 Amendments, Congress found fault with this scheme in which the Deputy Commissioners were both administrators and adjudicators. Thus, Congress split off the adjudicatory function, adopting the Administrative Procedure Act and utilizing hearing examiners (now called Administrative Law Judges), with an appeal to the Benefits Review Board. 33 U.S.C. §§ 919, 921(b). Congress did not intend the administrative function to be involved in the adjudication process, and noted that the pre-1972 scheme:

> *[s]uffered by virtue of the failure to keep separate the functions of administering the program and sitting in judgment on the hearings.* Moreover, with the new responsibilities that will devolve upon the Secretary with the passage of this bill it will be extremely important to have full time able *administrators who will not also have to wear the dual hat of being hearing officers* for purposes of the disputes brought under this statute.

H. Rep. No. 92-1441, 92nd Congress, 2nd Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 4698, 4708 (emphasis added).[4]

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[4] The Petitioner relies heavily on a 1977 Senate Committee Report concerning Title IV of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 901 *et seq.* ("BLBA"). Petitioner's Brief at 29. Even putting aside the fact the comment was made 5 years after the 1972 Amendments to the Longshore Act were passed, in that Report Congress recognized the need for a

Thus, prior to 1972, the Deputy Commissioner was a defendant in the federal court review action. There was, therefore, no such thing as an appeal by the Director. The Secretary of Labor would not have sought an injunction against his own Deputy Commissioner. The 1972 Amendments merely replaced Deputy Commissioners with Administrative Law Judges and the Benefits Review Board. Congress did not envision an additional discrete role for the Secretary of Labor, apart from his own Board, in the adjudication process. To the contrary, the only role contemplated for the Secretary was for him to request a remand from the Benefits Review Board for further fact finding under section 21(b)(4) of the Act. 33 U.S.C. § 921(b)(4). Section 21a was also amended to allow the Secretary to appoint attorneys to represent him, the Deputy Commissioners or the Benefits Review Board in Court, in an enforcement proceeding, instead of United States Attorneys. *See* 33 U.S.C. § 921a.

After the 1972 Amendments, the Secretary of Labor created the Director, Office of Workers' Compensation Programs, 20 C.F.R. § 701.201. For reasons not altogether clear, the Director, a delegate of the Secretary of Labor, started to appeal decisions of the Benefits Review Board, another delegate of the Secretary of Labor.

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legislative standing provision and enacted one for the BLBA. 30 U.S.C. § 932(k). There is no such provision in the Longshore Act. Indeed, under the BLBA, the Secretary, usually either defends against the claim, or is involved in determining the responsible operator/employer, and then seeks reimbursement from the employer via a trust fund. *See* Section I.E *infra*.

B. The Pending Workers' Compensation Claim

The Claimant, Jackie Harcum, was employed by Respondent Newport News Shipbuilding and Dry Dock Company ("Newport News Shipbuilding" or "the Shipyard") when he sustained a lumbar spine injury on October 21, 1984 (Pet. App. at 38a). Following surgery, Newport News Shipbuilding provided Harcum a light duty job in a shop during his convalescence. When Harcum's injury reached maximum medical improvement, permanent medical work restrictions were imposed and he returned to work on board ships (Pet. App. at 41a-42a). Harcum continued to complain of back pain after returning to shipboard work, and additional work restrictions were imposed. Newport News Shipbuilding had no work available within the more severe work restrictions, and thus, Harcum was released from employment with the Shipyard on May 6, 1988 (Pet. App. at 42a-43a).

When Harcum was released from employment, he was advised that the Shipyard would notify him if a suitable permanent light duty job later became available. Newport News Shipbuilding did not, however, promise Harcum an alternate position, nor did it suggest that he need not look for employment in the open labor market (Pet. App. at 43a). No permanent light duty position at Newport News Shipbuilding became available, even after a renewed search for such a job for Harcum (Pet. App. at 44a). Harcum did not look for another job until early in 1989, when a vocational rehabilitation consultant retained by Newport News Shipbuilding, Frances C. DeMark, located a job for him with another employer. DeMark

arranged an interview, and shortly thereafter on February 16, 1989, Harcum was hired for the position DeMark located (Pet. App. at 43a-47a).[5]

A hearing was held before an Administrative Law Judge on October 20, 1989. The issues were whether Harcum was entitled to temporary partial disability compensation under 33 U.S.C. § 908(e) because he was unable to work overtime during his last period of employment at the Shipyard; whether Harcum was entitled to temporary total disability compensation pursuant to 33 U.S.C. § 908(b) for allegedly being given work more strenuous than his restrictions when he returned to shipboard work in 1988 with Newport News Shipbuilding; whether Harcum was totally or partially disabled under 33 U.S.C. § 908(c)(21) during the time after his release from employment at the Shipyard on May 6, 1988 and February 16, 1989 when he accepted another job in the open labor market; and whether Newport News Shipbuilding is entitled to limit its liability for Harcum's permanent

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[5] The Longshore Act does not place any obligation on an employer to help a claimant find work, nor to provide him with such rehabilitation assistance. Rather, a claimant's residual earning capacity is based on what he could earn if he diligently looked for work. Employers generally prove a claimant's residual earning capacity by hiring a vocational rehabilitation counselor as an expert witness to perform a labor market survey to identify available jobs and thus prove wage earning capacity. While employers are not obligated in any manner to help the worker find a job, some employers, like Newport News Shipbuilding, voluntarily go a step further and help injured claimants find work in the open labor market. *See* 33 U.S.C. § 908(h); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540 (4th Cir. 1988).

partial disability compensation pursuant to the second injury fund provision in section 8(f) of the Act, 33 U.S.C. § 908(f).[6]

The Administrative Law Judge issued his decision on March 28, 1990. The Judge found that Harcum was entitled to a temporary partial disability award for lost overtime while working in a shop (Pet. App. at 55a) and a temporary total disability award for being worked outside of his restrictions during the period he returned to shipboard work, even though Harcum was paid his regular wage and worked a substantial amount of overtime during that time period (Pet. App. at 57a-59a). The Administrative Law Judge also found that Harcum was only partially disabled after his release from Newport News Shipbuilding on May 6, 1988 and before February 16, 1989 when he accepted the job in the open market located by the vocational rehabilitation consultant retained by the Shipyard (Pet. App. at 56a-57a). Newport News Shipbuilding was also awarded relief from the Special Fund pursuant to section 8(f) (Pet. App. at 59a-61a).

In reaching his decision that Harcum was only partially disabled between May 6, 1988 and February 16, 1989, the Administrative Law Judge relied in part on *Stevens v. Lockheed Shipbuilding Co.*, 22 B.R.B.S. 155, 157-159 (1989), *rev'd in pert. part sub nom., Stevens v.*

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[6] When an employer is awarded relief pursuant to 33 U.S.C. § 908(f), its liability for a claimant's compensation for a permanent disability is limited to 104 weeks. At the conclusion of the 104 week period, liability for the claimant's compensation is transferred to the Special Fund.

Director, OWCP, 909 F.2d 1256 (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991), which held that a claimant's residual wage earning capacity relates back to the date his injury reaches maximum medical improvement (Pet. App. at 56a-57a). The Director, who had not appeared at the hearing before the Administrative Law Judge, appealed (Pet. App. at 29a, 33a).[7] Before the Board, the Director argued that the Administrative Law Judge erred in his determination that Harcum's residual wage-earning capacity relates back to the date of maximum medical improvement, and thus, that he was only partially disabled between May 6, 1988 and February 16, 1989. The Director also argued that Newport News Shipbuilding was not entitled to limit its liability pursuant to section 8(f).

On May 28, 1992, the Board affirmed the Administrative Law Judge's decision and order.[8] During the pendency of the Director's appeal, *Stevens* was reversed by the Ninth Circuit, which held employers must prove when the suitable alternative employment was available. Nevertheless, the Board affirmed the Administrative Law Judge's finding that Harcum was not totally disabled after he left Newport News Shipbuilding. The Board ruled that vocational rehabilitation counselor DeMark's

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[7] The Director did file a post-hearing brief with the Administrative Law Judge. However, the only issue addressed in the Director's brief was Newport News Shipbuilding's claim for section 8(f) relief (Director's Post-Hearing Brief at 2).

[8] The Board decision reprinted in Appendix C to the Director's Petition for a Writ of Certiorari reflects the incorrect date of May 28, 1990 (Pet. App. at 27a-36a). The Board's decision was issued on May 28, 1992.

hearing testimony identified specific appropriate job opportunities available to Harcum during the relevant period, and thus demonstrated that Harcum was employable if he had looked for work. The Board also ruled that Newport News Shipbuilding's voluntary attempt to locate a light duty job within its facility did not impact on the evidence of available alternate employment outside of the Shipyard in the open labor market. Thus, under *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540 (4th Cir. 1988), Harcum was not totally disabled. The Board also affirmed the Administrative Law Judge's finding that Newport News Shipbuilding's liability for Harcum's permanent partial disability compensation is limited to 104 weeks of compensation under section 8(f).

The Director then sought review of the Board's decision in the United States Court of Appeals for the Fourth Circuit pursuant to 33 U.S.C. § 921(c). Harcum did not participate in the review proceeding, and the Director did not include Harcum in the caption of her petition for review. On September 17, 1992, the Director moved to amend the caption to add Harcum as a respondent (Director's Motion To Amend Caption). In response to an inquiry from the Court of Appeals, on October 1, 1992, Harcum expressly declined to participate in the review proceeding.[9] His counsel stated that "[t]he director appealed the case and may pursue the case as the director chooses. Claimant has not appealed." (Attachments A and B to Respondent's Answer to Petitioner's Petition for Rehearing). The Director then moved to withdraw her

[9] Harcum's counsel's letter is incorrectly dated October 1, 1991, instead of 1992.

motion to amend the caption (Director's Motion to Withdraw Motion to Amend Caption). The Director's motion to withdraw was mailed on October 5, 1992, but on October 6, 1992, the Court of Appeals granted the Director's motion and amended the caption to show Harcum as the claimant in the proceedings below (October 6, 1992 Order).

The clerk of the Court of Appeals wrote counsel for the Director and Newport News Shipbuilding on October 7, 1992. The Court's letter/order stated that the Director's motion to withdraw was not filed until October 7, 1992, the day after the Court granted the Director's motion to amend the caption. In a display of apparent frustration with the Director, the Court explicitly stated that "Harcum is not a party to this case. There will be no action taken on the motion to withdraw" (October 7, 1992 Letter/Order).

Before the Court of Appeals, the Director sought review of the Board's decision affirming Newport News Shipbuilding's award of section 8(f) relief. In addition, the Director asserted that the Board exceeded its authority by affirming the Administrative Law Judge's finding that Harcum was only partially disabled between May 6, 1988 and February 16, 1989 on different grounds from those relied on by the Administrative Law Judge. The Director also argued that because of Newport News Shipbuilding's attempts to locate a light duty job within its

facility, Harcum was somehow relieved from the obligation of looking for work.[10]

The Fourth Circuit issued its decision on October 29, 1993, and sua sponte, the Court first considered whether the Director had standing to seek review of the Board's order. The Court noted that 33 U.S.C. § 921(c) codifies the case or controversy requirement of Article III of the Constitution. The Court also noted that under 33 U.S.C. § 921(b), any party in interest may appeal an Administrative Law Judge's decision to the Board. However, the Act only authorizes persons adversely affected or aggrieved by a Board order to obtain review in the Courts of Appeals (Pet. App. at 9a). Thus, the Court examined whether the Director was adversely affected or aggrieved by the Board's order.

The Court applied the reasoning of the Fifth Circuit in *Director, OWCP v. Donzi Marine, Inc.*, 586 F.2d 377 (5th

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[10] Under the Act, if no work is available within the employee's medical restrictions, the employee is *prima facie* totally disabled. The employer must then prove that jobs within the claimant's capabilities are realistically available if the employee diligently sought employment. *Trans-State Dredging v. BRB*, 731 F.2d 199 (4th Cir. 1984); *Roger's Terminal & Shipping Corp, v. Director, OWCP*, 784 F.2d 687, 691 (5th Cir.), *cert denied*, 479 U.S. 826 (1986). An employer meets its burden of proof if it shows the actual availability of jobs. An employer is not required to offer the claimant a light duty job at its facility or to obtain a job offer for him. Rather, the employer need only show that there are available job openings in the labor market which the claimant is qualified for and which he could obtain if he diligently looked for work. *Trans-State Dredging*, 731 F. 2d at 201, *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042-43 (5th Cir. 1981).

Cir. 1978). In *Donzi Marine*, the Court concluded that the Act delegates four types of responsibilities to the Director which may be affected by a Board order: (1) the performance of a variety of general administrative and supervisory tasks; (2) the provision of assistance to injured employees covered by the Act in processing their claims; (3) the promulgation and enforcement of safety rules and regulations; and (4) the administration and protection of the assets of the Special Fund established by 33 U.S.C. § 944 (Pet. App. at 10a).

The Court then held that none of these four responsibilities was adversely affected by the Board's ruling that Harcum was only partially disabled between May 6, 1988 and February 16, 1989. Relying on *Donzi Marine*, as well as its own decision in *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 676 F.2d 110 (4th Cir. 1982),[11] the Fourth Circuit rejected the notion that the Director's administrative interests are adversely affected or aggrieved simply because the Board disagreed with the Director's position regarding a specific claim for workers' compensation benefits. The Court determined that the Board's decision with respect to Harcum's partial disability did not adversely affect any of the specific responsibilities delegated to the Director by Congress or the assets of the Special Fund. Accordingly, the Fourth Circuit held that the Director did not have standing to seek

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[11] The Fourth Circuit also relied on its decision in *I.T.O. Corp. v. BRB*, 563 F.2d 646, 648 (4th Cir. 1977), *reinstating in pertinent part*, 542 F.2d 903 (4th Cir. 1976), *vacated and remanded*, 433 U.S. 904 (1977). (Pet. App. at 12a n.1).

review of this aspect of the Board's decision (Pet. App. at 13a-14a).[12]

SUMMARY OF THE ARGUMENT

This Court's own precedents are clear that under Article III of the Constitution, a party can have standing to challenge a decision only if that party suffers an injury in fact. Section 21(c) of the Longshore Act adopts this standard by allowing only a "person adversely affected or aggrieved" to obtain review of a Board decision. The claim at issue in this case involves a dispute over how much compensation an employer owes a claimant. No administrative duties or functions of the Director, Office of Workers' Compensation Program are affected by the Board's ruling. Thus, on its face, the Board's decision does not involve an injury to the Director. She does not, therefore, have standing under either section 21(c) of the Act or Article III.

[12] The Administrative Law Judge found that Newport News Shipbuilding was entitled to limit its liability under section 8(f) and the Board affirmed this determination. Since one of the Director's delegated duties is to administer and to protect the assets of the Special Fund, the Court of Appeals concluded that the Director could obtain review of this aspect of Board's decision. The Fourth Circuit vacated the award of second injury fund relief to Newport News Shipbuilding and remanded that aspect of the case for further consideration in conformity with its interpretation of section 8(f) (Pet. App. at 14a-24a). Neither the Director nor Newport News Shipbuilding sought review of that portion of the Fourth Circuit's decision.

The Director seeks to avoid this result by arguing that her administrative duties under the Longshore Act give her an interest in every compensation decision. Indeed, the Director argues that her job is to maximize every claimant's award, apparently assuming the role not of an administrator, but as an advocate for claimants. Nowhere in the Longshore Act, however, is the Director named as a claimants' advocate. To the contrary, in the 1972 Amendments to the Act, Congress separated the administrative function (given to Deputy Commissioners, now called District Directors, who now report to the Director) from the claims adjudication function (given to hearing examiners – now called Administrative Law Judges and the Benefits Review Board). The statutory scheme also explicitly adopted the Administrative Procedure Act, and there is no stated role for the Director to act as an advocate for claimants. Indeed, the notion of an administrator of a workers' compensation system advocating the position of either a claimant or employer defies the neutral adjudication program Congress intended by the 1972 Amendments, and which fundamental fairness requires. Moreover, as demonstrated by the Director switching sides in at least two cases decided by this Court, there are significant practical and conflict of interest problems in allowing standing to a party whose interest is merely "administrative." For example, if the Director seeks to maximize a claimant's benefits, what will she do if the Special Fund, whose assets the Director is obligated to protect, is paying those benefits pursuant to section 8(f) of the Act?

Even if the Director were to show an injury in fact, she faces two additional obstacles to standing. First, she

must show causation between the injury and the opposing party. Since the Benefits Review Board, a delegate of the Secretary of Labor, issued the decision the Director complains of, and the Director is also a delegate of the Secretary of Labor, the Director cannot show causation attributable to the opposing party (the employer) required for Article III for standing. Second, even if Article III did allow the Director standing, section 21(c) of the Longshore Act on its face does not include the Director within its definition of a "person" who can obtain review of a Board decision.

While standing has been granted in disputes between separate agencies of the Executive Branch, this Court has never allowed part of one unitary agency to sue another part of the same agency. Indeed, this Court has never held that a mere administrative interest, without an injury in fact, is enough for standing. There is no need to do so in this case, as it is clear Congress never intended such a result when it enacted section 21(c) of the Act. To the contrary, Congress explicitly stated its desire to separate out administration from the adjudication of claims, and the Benefits Review Board alone is the Department of Labor claims adjudicator.

ARGUMENT

I. THE DIRECTOR DOES NOT HAVE STANDING TO OBTAIN REVIEW OF A BOARD DECISION WHERE SHE IS NOT ADVERSELY AFFECTED OR AGGRIEVED BY THE BOARD'S ORDER

A. Only Those Persons Who Have Suffered An Injury In Fact To A Legally-Protected Interest Have Standing To Invoke The Jurisdiction Of Federal Courts

The jurisdiction of federal courts is limited to "Cases" and "Controversies" by Article III of the Constitution of the United States. U.S. Const., Art. III, § 2. "[T]he core component of standing is an essential and unchanging part of the case or controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, ___ U.S. ___, 112 S.Ct. 2130, 2136 (1992). The question of whether a party has standing involves both constitutional and prudential limitations on the exercise of federal jurisdiction. *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

The standing doctrine focuses on the party seeking to invoke federal jurisdiction and not on the issues that party wishes to have adjudicated. *Flast v. Cohen*, 392 U.S. 83, 99 (1968). At a minimum, the party invoking federal jurisdiction must establish the existence of three elements in order to satisfy the constitutional standing requirement: (1) a concrete and particularized injury in fact to a legally-protected interest of the person asserting standing, (2) the injury complained of must be attributable to the challenged action of the defendant (or in this case respondent) and (3) it must be likely that the injury will

be redressed by a favorable decision of the federal court. *See Lujan v. Defenders of Wildlife*, 112 S.Ct. at 2136.[13]

Congress may extend standing to those who would otherwise be unable to invoke federal jurisdiction by prudential standing rules, subject to Article III. *Warth v. Seldin*, 422 U.S. at 501. Congress may not, however, abrogate the minimum requirements for Article III standing. *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979). The party asserting standing must show that he himself has sustained an injury in fact. *Valley Forge Christian College v. Americans United For Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). Moreover, even if a party has statutory standing, that party must still establish that he has Article III standing. He must show the existence of a justiciable controversy. *See Director, OWCP v. Perini North River Assoc.*, 459 U.S. 297, 304 (1983).

The dispute before this Court involves an issue concerning how much compensation an employer must pay a

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[13] The Court of Appeals based its decision in this case on the "injury in fact" element. Newport News Shipbuilding asserts that the second element of standing is also absent from this case. The Secretary, through the Director, contends he has been injured by an erroneous determination of the Board. The Board, however, is a quasi-judicial body within the Department of Labor, *Ryan-Walsh Stevedoring Co., Inc. v. Trainer*, 601 F.2d 1306, 1314 n.7 (5th Cir. 1979). Its members are appointed by the Secretary, and the Board operates pursuant to a delegation of authority from the Secretary. 33 U.S.C. § 921(b)(1). This case thus presents a situation where one delegate of the Secretary is seeking redress from an administrative adjudication by another delegate of the Secretary. The Secretary is, in essence, seeking an advisory opinion. This is precisely the type of situation the standing doctrine is designed to avoid. *See* Section II, *infra*.

claimant. The Director is not injured in any manner by the Board's decision on this issue.

B. The Longshore Act Does Not Authorize The Director, On Behalf Of The Secretary Of Labor, To Seek Review Of Board Decisions Adjudicating Claims Between Private Parties. To The Contrary, The 1972 Longshore Amendments Made Clear Congress' Decision to Separate The Administrative Function From the Adjudicatory Process.

The Director asserts that she has standing to seek review of each and every Board decision rendered under the Act, irrespective of any injury to the Director's interests. *See Director, OWCP v. Nat'l Van Lines, Inc.*, 613 F.2d 972, 977 n.6 (D.C. Cir. 1979), *cert. denied*, 448 U.S. 907 (1980). Nothing in the language of the Act, however, authorizes the Secretary, or his delegate, the Director, to seek judicial review of Board decisions which simply adjudicate claims between private parties. Section 21(c) authorizes any "*person* adversely affected or aggrieved" by a Board order to seek judicial review of that decision. 33 U.S.C. § 921(c) (emphasis added). Neither the Secretary of Labor, nor the Director falls within this definition. *Compare* 33 U.S.C. §§ 902(1), (6).

The statutory framework created by the Act confirms that section 21(c) does not authorize the Director to seek review of Board decisions, at least where her administrative powers or Special Fund relief are not at issue. The Board is not outside the Executive Branch like an independent regulatory agency or tribunal. The Board is a quasi-judicial administrative body within the Department

of Labor. *Ryan-Walsh Stevedoring Co., Inc. v. Trainer*, 601 F.2d 1306, 1314 n.7 (5th Cir. 1979). The Secretary oversees the Board's functioning. 33 U.S.C. § 921(b)(1). The Board is organizationally located within the office of a Deputy Secretary of Labor, 20 C.F.R. § 801.103, and its members serve at the pleasure of the Secretary, 20 C.F.R. § 801.201. Thus, the Secretary may remove a Board member without cause. *Kalaris v. Donovan*, 697 F.2d 376, 389-397 (D.C. Cir.), *cert. denied*, 462 U.S. 1119 (1983). There is no question but that the Board is an adjudicative body within the Department of Labor subject to the Secretary's oversight. The Director and the Board are thus both delegates of the Secretary. In this case, the Secretary, through the Director, is seeking review of an adjudication by an administrative body within the same agency he oversees. In essence, the Secretary is seeking an advisory opinion concerning competing views of the Act's provisions from within his own department. This is the very type of situation the standing doctrine is designed to avoid.[14]

The legislative history to the Longshore Act noted above confirms Congress never envisioned that the Secretary would appeal his own decision via his Benefits

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[14] The Director asserts that the Secretary promulgated regulations granting the Director standing to appear at all stages of the adjudication process, including before the Courts of Appeals. 20 C.F.R. §§ 802.201(a)(1), 802.410. This assertion is, however, irrelevant. An agency's power to promulgate regulations is no greater than the authority delegated by Congress. *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208 (1988). Congress did not authorize universal standing for the Secretary or his delegate, and the Secretary cannot do so by regulation.

Review Board. Prior to 1972, such an appeal was impossible. Deputy Commissioners in the Department of Labor issued compensation orders and the only appeal available was to seek an injunction against the Deputy Commissioner. The Secretary would not seek an injunction against his own Deputy Commissioner. The 1972 Amendments were enacted to separate the Secretary's administrative function from the adjudicatory process. The Amendments were not intended to give the Secretary an advocate's role. The adjudicatory function was delegated by the Act itself to hearing examiners (Administrative Law Judges) and the Benefits Review Board. Congress, in the legislative history to the 1972 Amendments, criticized the prior system of combined administrative and adjudication processes. Congress created the Benefits Review Board to separate these two functions. *See* pages 8-10, *supra*.

C. The Director's Mere Status As Administrator Of The Longshore Act Does Not Make Her Adversely Affected Or Aggrieved By Every Board Decision. The Secretary Is A Neutral Administrator, And Is An Advocate For Neither Claimants Nor Employers.

Section 21(c) of the Act confers standing to obtain review of Board orders on persons "adversely affected or aggrieved" by such an order. 33 U.S.C. § 921(c). As the Court of Appeals noted below, this language codifies the first of the three minimum constitutional criteria for standing (Pet. App. at 9a n.1). The Director is not, however, "adversely affected or aggrieved" simply because

the Board rendered a decision on a portion of Harcum's claim with which the Director disagrees.[15]

The Director is charged with the responsibility of administering the Act. This administrative responsibility does not include claims adjudication. The Longshore Act clearly delegates that responsibility to hearing examiners (Administrative Law Judges) and the Board. Since the Director is not charged with any function in the adjudication of claims, it is difficult to see how her administrative role gives rise to standing in a case which does not involve an administrative issue.

Indeed, the Director in her brief apparently recognizes that responsibility for administrative duties does not give her standing in a pure compensation dispute between an employer and a claimant. The Director attempts to cure this defect by arguing that one of her duties is to maximize claimants' compensation. That is, the Director asserts she has an interest in ensuring "adequate compensation payments to claimants" (Director's Brief at 18). The Director contends that the Act "has many of the elements of social insurance," and thus, she has

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[15] This issue was raised before this Court before in *Director, OWCP v. Perini North River Assoc.*, 459 U.S. 297 (1983). Perini contended that the Director did not have standing to seek review of a decision of the Second Circuit. The Director argued that her administrative responsibilities somehow conferred standing as an aggrieved party. It was not, however, necessary to resolve the question because the injured employee was present and filed briefs before the Court as well. In this claim, Harcum was not present before the Fourth Circuit and he is not present before this Court. Thus, the issue of the Director's standing under section 21(c) is directly before the Court.

some type of authority to ensure "that claimants receive the maximum benefits to which they are entitled" (Petition for Writ of Certiorari at 21). While it is no doubt true that the Director has at times taken this view, this Court has always recognized that the Act does not dictate such a result. Rather, this Court has recognized that the Act is a compromise workers' compensation system, to be administered as Congress drafted the program. *See, Potomac Elec. Power Co. v. Director, OWCP*, 449 U.S. at 282 ("like most workmen's compensation legislation, the LHWCA represents a compromise between the competing interests of disabled laborers and their employers"); *Director, OWCP v. Greenwich Collieries*, ___ U.S. ___, 114 S.Ct. 2251, 2259 (1994) (Secretary's interpretation regarding allocation of burden of proof violates the Longshore Act and the APA). Indeed, at times the Director has recognized that her role is not as a claimants' advocate. In at least two cases decided by this Court, the Director has switched sides; while advocating a position favorable to the claimants before the Courts of Appeals, the Director changed positions and supported the employers before this Court. *See Estate of Cowart v. Nicklos Drilling Co.*, ___ U.S. ___, 112 S.Ct. 2589, 2594 (1992); *Morrison-Knudsen Constr. Co. v. Director, OWCP*, 461 U.S. at 628 n.4.

None of the decisions cited by the Director indicates that this Court has ever allowed standing to an individual or agency merely because the individual or agency has a general interest in a certain subject matter. The Director is the administrator of the workers' compensation program created by the Act. Thus, she has Article III standing to

appeal decisions dealing with her power to enforce compensation orders in United States District Courts. Similarly, she has Article III standing to appeal decisions dealing with her procedural rules for administering Longshore Act claims. Indeed, she arguably has Article III standing to appeal decisions on the jurisdictional scope of the Longshore Act, since such decisions define her administration. In addition, as the caretaker and protector of the Special Fund, the Director has Article III standing to appeal awards against the Special Fund. Nevertheless, when it comes to disputes between a claimant and an employer over how much compensation the claimant is due, the Director has no interest, and thus should have no standing.

In such compensation claims, the Director is much like a taxpayer in one of the taxation spending cases this Court has decided. While the Director, like a taxpayer, may be interested in the outcome, that vague interest is not enough to create standing – a concrete injury in fact and a personal stake in the outcome of the controversy are required. *See, e.g. Flast v. Cohen*, 392 U.S. at 99-101.

An administrator of claims should be neutral. The administrator's job is to assure the claim is tried before the adjudicative bodies Congress directed - Administrative Law Judges and the Benefits Review Board. Nowhere in the Longshore Act does the statute permit the Director to take sides. To the contrary, the 1972 Amendments to

the Longshore Act were designed to separate the administrative function and the adjudicatory function. *See* pages 8-10, *supra*.[16]

The Longshore Act simply has no role for the Director, one delegate of the Secretary of Labor, to challenge a decision of the Benefits Review Board, another delegate of the Secretary of Labor, when the issue is one solely between the claimant and employer. Numerous practical considerations show that Congress never intended to delegate such wide-ranging authority to the Director. First, the Act creates a typical workers' compensation framework in which the parties' pursue their own interests. The Act even provides for the direct payment of a successful claimant's attorney's fees and expenses by the worker's employer or insurance carrier. 33 U.S.C. § 928. As a result, there is no need for the Director to act as an advocate for claimants. The Act provides a mechanism

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[16] The Longshore Act does state that the Director can provide legal assistance to claimants. 33 U.S.C. § 939(c) Thus, assuming the Director can legally represent claimants, she could have standing if he appeared as counsel for a claimant. Of course, he would then have an obligation to that claimant to represent his or her interests. Indeed, this goes to the very heart of the standing issue. If one has a real injury in fact, one will act consistently to minimize the injury. When one has merely an "administrative" interest, one can change positions, depending on the administrative political viewpoint. This explains why the Director has twice changed his position from the Court of Appeals to this Court on major issues. *Estate of Cowart v. Nicklos Drilling Co.* ___ U.S. ___, 112 S.Ct. 2589, 2594 (1992); *Morrison-Knudsen Constr. Co. v. Director, OWCP*, 461 U.S. 624, 628 n.4 (1983). While an amicus or intervenor can do so, a party with standing should not be in a position to change sides; if he does, the Article III controversy is lost.

for the payment of injured workers' attorney's fees by employers, and thus, injured workers are perfectly capable of prosecuting their own claims.

Indeed, Harcum was represented in this case and was successful in obtaining all compensation he claimed with the exception of the differential between permanent partial and permanent total disability compensation between May 6, 1988 and February 16, 1989. Harcum was even successful in obtaining temporary total disability compensation from January 18, 1988 through May 6, 1988 because the Administrative Law Judge found that he had been given work beyond the scope of his medical restrictions. Harcum was awarded this total disability compensation *in addition* to his regular wages and additional pay for 48 hours of overtime worked (Pet. App. at 57a-59a). Harcum was ably represented and Newport News Shipbuilding is liable for his attorneys' fees. The notion that Harcum also needed the Director to successfully prosecute his claim has no basis in fact.

Second, it is not unusual for the Director's view of the correct statutory interpretation to change during the life of a claim. It has happened at least twice in cases decided before this Court. *See Estate of Cowart v. Nicklos Drilling Co.*, ___ U.S. ___, 112 S.Ct. 2589, 2594 (1992); *Morrison-Knudsen Constr. Co. v. Director, OWCP*, 461 U.S. 624, 628 n.4 (1983). The Director's contention that she has a cognizable interest in the development of uniform interpretation of the Act's provisions is questionable when her own office is unable to agree on such an interpretation. Moreover, it is unclear how the Director's ability to seek review of Board decisions will improve consistency, since review would be available in twelve different Courts of

Appeals. The Director's claimed interest in "consistency" is too tenuous to confer Article III standing, which requires an injury in fact.

Finally, and of critical importance, if the Director is free to insert herself into any contested claim, this may result in the Director taking positions which are in direct conflict with her pecuniary interest in protecting the assets of the Special Fund. The Treasurer of the United States is the custodian of the assets of the Special Fund, and the Director, as delegate of the Secretary, is its administrator. 33 U.S.C. § 944(a). As administrator of the Special Fund, the Director is obligated to protect its assets. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 676 F.2d at 114; *Director, OWCP v. Donzi Marine*, 586 F.2d at 379-80.

In the vast majority of cases in which the Director participates beyond the section 8(f) issue, she advocates a position which supports increased compensation liability, as she does in this case. In a case involving a claim for permanent disability benefits which also involves a claim by the employer to limit its liability to 104 weeks pursuant to section 8(f), such a position at least potentially increases the liability of the Special Fund. At the conclusion of the 104 week period of employer liability, the Special Fund becomes liable for the claimant's compensation. For example, an assertion by the Director that a particular claimant is entitled to greater weekly compensation payments increases the liability of the Special Fund. Such a situation presents a direct conflict of interest for the Director. Congress clearly did not intend such an anomalous result.

In its decision below, the Fourth Circuit noted another, but more attenuated, manner in which the Director's support of a claimant might adversely affect the Special Fund. The Court recognized that if an employer or insurer becomes insolvent, the Secretary has the discretion to make the employer's compensation payments from the Special Fund pursuant to 33 U.S.C. § 918(b). In the unlikely event such a situation occurred in this instance, the position advocated by the Director would increase the financial burden on the Special Fund (Pet. App. at 14a). The potential conflict of interest in either situation illustrates that Congress did not intend to authorize the Secretary or his delegate to seek review of Board decisions unless one of the Director's specifically delegated responsibilities or the assets of the Special Fund are impaired by the Board's decision.

D. The Enforcement Duties Conferred On The Director Are Extremely Narrow And Do Not Even Concern The Adjudication Of Contested Claims Between Covered Workers And Their Employers

The Director asserts that the Act confers broad enforcement duties on her, and that these enforcement duties somehow create a cognizable interest in the outcome of compensation claims. The enforcement responsibilities delegated to the Director, however, are extremely narrow and they have nothing whatsoever to do with contested compensation claims. More to the point, none of the Director's enforcement duties are even remotely involved in this case.

In fact, the *only* enforcement duty cited by the Director is the statutory authority, pursuant to 33 U.S.C. § 921(d), for District Directors to bring actions in United States District Courts to enforce compensation awards. This enforcement obligation only arises, however, when an employer fails to comply with a compensation order. *Id.* When a compensation order has been entered by a District Director pursuant to an agreement between the private parties or when a final compensation order has been entered in a contested case, the enforcement duty arises when the entity against whom the order is entered fails to pay the ordered compensation. Then, and only then, an action may be initiated in the appropriate District Court. This enforcement duty is clearly very limited.

While the Director has other limited enforcement obligations, they are not involved in this case. She is responsible for enforcing safety regulations promulgated under the Act. 33 U.S.C. § 941(b)(5). The Director is also responsible for certain enforcement activities with respect to assessments against self-insured employers and insurance carriers for payments into the Special Fund. *See* 33 U.S.C. § 944(d). That, however, is the extent of the Director's enforcement duties. The Director's enforcement authority is extremely narrow and specifically limited by the Act's language, and this limited duty cannot be the basis for universal standing. To the contrary, decisions interpreting Article III are clear on this point. The Director's standing exists only in those cases where the Director's administrative powers are at issue.

The Act established a traditional workers' compensation system in which private parties represent their own interests. Unlike the statutes involved in the cases cited

by the Director, the Longshore Act contains no central governmental enforcement mechanism. *See General Tel. Co. v. EEOC*, 446 U.S. 318 (1980) (Civil Rights Act of 1964 explicitly authorizes EEOC to file civil enforcement action); *Secretary of Labor v. Fitzsimmons*, 805 F.2d 682, 690 (7th Cir. 1986) (Employee Retirement and Income Security Act explicitly authorizes Secretary to bring a civil action); *Donovan v. University of Texas at El Paso*, 643 F.2d 1201, 1203-04 (5th Cir. 1981) (Fair Labor Standards Act explicitly authorizes Secretary to bring suits to recover unpaid minimum wages and overtime compensation and liquidated damages on behalf of employees named in a complaint). There is nothing in the Longshore Act that even suggests such a role for the Secretary or his delegate to adjudicate claims, except in the form of the Benefits Review Board.

E. The Legislative History And Decisions Interpreting The Black Lung Benefits Act Are Not Relevant In This Case Because That Statute, Unlike The Longshore Act, Explicitly Makes The Secretary Of Labor A Party To Every Claim, And Under The Black Lung Act, The Secretary Defends Against The Claim Or Is Involved In Determining The Responsible Operator

The Director's brief contains numerous citations to Title IV of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 901 *et seq.* (the "Black Lung Benefits Act" or "BLBA"). Although the BLBA does incorporate some provisions of the Longshore Act, the BLBA is irrelevant with respect to the issue before this Court, because under the BLBA, but not the Longshore Act, the

Director is explicitly given standing, and the Director represents the employer's interest in defending against a claim when no responsible operator can be identified, or the Director is involved in the determination of who is the responsible operator.

The BLBA explicitly provides that "[t]he Secretary [of Labor] shall be a party in any proceeding relative to a claim for benefits under this part." 30 U.S.C. § 932(k). Thus, the BLBA explicitly confers status as a party on the Director as delegate of the Secretary. If Congress had intended to grant the Director universal standing under the Longshore Act, it would have done so as it did under the BLBA. The fact that there is no comparable provision contained in the Longshore Act shows that the broad standing claimed by the Director was never intended by Congress.

Moreover, under the BLBA, if no responsible operator can be identified, which frequently is the case, and the Director questions the claimant's entitlement to benefits, *e.g.* whether he has pneumoconiosis, then the Director defends against the claim, in the same manner an employer/operator would. Often times the claimant is entitled to benefits, but there is a dispute as to who is the responsible operator. Compensation is then paid by the Black Lung Disability Trust Fund in the first instance. The Director then seeks to identify the responsible operator, who then is liable to repay the trust fund, which the Director administers. *See* 30 U.S.C. § 934(b); 20 C.F.R. §§ 725.420, 725.490, 725.522; *Helen Mining Co. v. Director, OWCP*, 924 F.2d 1269, 1271-1275 (3rd Cir. 1991).

Thus, the BLBA, its legislative history and decisions interpreting that statute are not relevant for two reasons. First, the BLBA explicitly makes the Secretary, and by delegation the Director, a party to every claim. The Longshore Act contains no comparable provision. Second, under the BLBA, the Black Lung Disability Trust Fund is primarily liable for miners' compensation in the majority of cases, and the Director administers that Fund. Under the Longshore Act, the responsible employer or insurance carrier is primarily liable for maritime workers' compensation.

Indeed, the very legislative history from the BLBA which the Director cites (Petitioner's Brief at 29) contradicts the Director's argument. While the Senate report noted that body's assumption that adoption of the Longshore Act procedures gave the Director standing (which might well be true under BLBA because the Director stands in the employer's shoes or is involved in determining the responsible operator), the Senate ultimately recognized that its belief was wrong. Thus, pursuant to that report, it enacted a provision conferring standing on the Director under the BLBA. The Longshore Act has no comparable provision.

II. THE DIRECTOR DOES NOT HAVE ARTICLE III STANDING BECAUSE THIS CASE INVOLVES ONE DELEGATE OF THE SECRETARY OF LABOR SEEKING REVIEW OF AN ADMINISTRATIVE ADJUDICATION BY ANOTHER DELEGATE OF THE SECRETARY

In order to satisfy Article III standing, the party asserting standing must establish not only an injury in fact, but also a causal connection between the injury and

the conduct of the opposing party. The causal connection required by the second Constitutional criterion for standing is absent in this case. With respect to the causation criterion, this Court noted in *Lujan v. Defenders of Wildlife*, 112 S.Ct. at 2136, that "the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.' " *Id. quoting, Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976). The action the Director is actually challenging is the Board's decision that Harcum was only partially disabled between May 6, 1988 and February 16, 1989.

The Director is a delegate of the Secretary of Labor. 20 C.F.R. §§ 701.201, 701.202(a). The Board is also a delegate of the Secretary. 33 U.S.C. § 921(b)(1). For organizational purposes, the Board falls under a Deputy Secretary of Labor. 20 C.F.R. § 801.103. Its members are appointed by the Secretary and serve at his pleasure. 20 C.F.R. § 801.201. Board members may be removed by the Secretary even without cause. *Kalaris v. Donovan*, 697 F.2d 389-97. The Board is a quasi-judicial body, but it is a part of the Department of Labor. *Ryan-Walsh Stevedoring Co., Inc. v. Trainer*, 601 F.2d at 1314 n.7.

Since the Board and the Director are both delegates of the Secretary of Labor, the Secretary is, in essence, seeking an advisory opinion from the Court of Appeals to resolve a dispute concerning competing interpretations of the Act between two entities within his own department. While the interpretation of the Act rendered by the Board was asserted by Newport News Shipbuilding, the Board's decision is still an adjudication by an administrative body within the Department of Labor. The Secretary, through

the Director, is seeking review of an administrative adjudication by an entity within the very department he oversees. The injury complained of in this case is not attributable to the Respondent, Newport News Shipbuilding. *See Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41 (1976). Thus, there is no justiciable controversy and Article III standing does not exist.

III. SECTION 21(c) OF THE LONGSHORE ACT DOES NOT CONFER STANDING ON THE DIRECTOR

Section 21(c) of the Longshore Act allows a "person" to appeal a Board decision to the Benefits Review Board. 33 U.S.C. § 921(c). While the Secretary is defined in section 2(6) of the Act, 33 U.S.C. § 902(6), he is not explicitly included in the section 2(1) definition of a person: "the term 'person' means individual, partnership, corporation or association." 33 U.S.C. § 902(1).

While the Director will no doubt argue that this omission was an oversight, the legislative history indicates that it was intentional. As noted above, before 1972, the Secretary could not appeal a decision of his own Deputy Commissioners, since the only appeal process was an injunction against enforcement of the Deputy Commissioner's decision. In enacting the 1972 Amendments, Congress gave no indication it intended to create an advocate's role for the Secretary. Rather, Congress wanted the Secretary's administrative role and adjudication role separated. The latter role was legislatively given to the Benefits Review Board. *See* pages 8-10, *supra*.

This Court has repeatedly directed that the Longshore Act should be enforced as written. *Potomac Elec. Power Co. v. Director*, 449 U.S. 268, 281 (1980); *Estate of Cowart v. Nicklos Drilling Co.*, ___ U.S. ___, 112 S.Ct. 2589, 2594 (1994). Section 21(c), as written and as shown by the legislative history, does not allow the Director, a delegate of the Secretary of Labor, to appeal a decision of the Benefits Review Board, another delegate of the Secretary of Labor.

The Fourth Circuit, in the decision below, did not, of course, have to reach the issue of the definition of a "person" in section 21(c). Rather, the Fourth Circuit found that the Director was not affected or aggrieved, as is also required by section 21(c) of the Act. Because the Director's administrative powers and Special Fund responsibilities were not implicated in the Board's decision to limit Harcum's compensation to a partial disability award in this case, the Fourth Circuit's ruling is clearly correct.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

LAWRENCE P. POSTOL*
JAMES M. MESNARD
SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON
Suite 500
815 Connecticut Ave., N.W.
Washington, D.C. 20006-4004
(202) 463-2400

Counsel for Respondent,
Newport News Shipbuilding &
Dry Dock Company

**Counsel of Record*

DATED: December 5, 1994

APPENDIX

STATUTORY AND REGULATORY PROVISIONS

The United States Constitution provides in relevant part:

ARTICLE III – THE JUDICIARY

* * *

> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between Citizens of different States; – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

The Longshore and Harbor Workers' Compensation Act, as codified at 33 U.S.C. § 901 *et seq.*, provides in relevant part:

§ 902. Definitions

When used in this chapter –

> (1) The term "person" means individual, partnership, corporation, or association.
>
> * * *
>
> (6) The term "Secretary" means the Secretary of Labor

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No. 93-1783

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Petitioner,
v.
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, *et al.*,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE ON BEHALF OF THE NATIONAL ASSOCIATION OF WATERFRONT EMPLOYERS, MASTER CONTRACTING STEVEDORE ASSOCIATION OF THE PACIFIC COAST, INC., THE ALLIANCE OF AMERICAN INSURERS, AND SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD. IN SUPPORT OF RESPONDENT

DENNIS J. LINDSAY
LINDSAY, HART, NEIL & WEIGLER
General Counsel
Master Contracting Stevedore Association of the Pacific Coast, Inc.
1300 S.W. Fifth Ave.
Suite 3400
Portland, OR 97201-5696
(503) 226-7677

CHARLES T. CARROLL, JR.*
THOMAS D. WILCOX
THOMAS D. WILCOX, P.C.
2011 Eye Street, N.W.
Suite 301
Washington, D.C. 20006
(202) 296-3005

*Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Pursuant to Rule 37 of the Rules of the Supreme Court of the United States, the National Association of Waterfront Employers, Master Contracting Stevedore Association of the Pacific Coast, Inc., the Alliance of American Insurers, and Signal Mutual Indemnity Association, Ltd. move for leave to file the brief *amici curiae* in support of Respondent, Newport News Shipbuilding and Dry Dock Company.

The Federal Petitioner has consented in writing to the filing of a brief *amici curiae* on behalf of the listed par-

ties, and such consent has been filed with the clerk of this Court. Respondent has not so consented.

The National Association of Waterfront Employers (NAWE), formerly the National Association of Stevedores (NAS), is a not-for-profit tax exempt [26 U.S.C. § 501(c)(6)] trade association organized under the laws of the District of Columbia whose 33 member companies are stevedore contractor/marine terminal operators doing business on all four of the nation's seacoasts, the states of Alaska and Hawaii, and the Commonwealth of Puerto Rico. With the exception of the Puerto Rico members, every NAWE member company employs longshore labor engaged in maritime employment subject to the Longshore and Harbor Workers' Compensation Act (LHWCA).

The Master Contracting Stevedore Association of the Pacific Coast, Inc. (MCSA) is a not-for-profit trade association whose 15 member companies provide contract stevedoring services in all principal ports in the states of California, Oregon and Washington, and provide substantially all the marine terminal and stevedoring services performed by private contractors to ocean-going vessels calling at ports in those states. MCSA member companies employ a work force of approximately 10,000 longshoremen and clerks who are engaged in maritime employment subject to the LHWCA.

The Alliance of American Insurers is an association of 214 insurance companies whose member companies write property and casualty insurance, including state workers' compensation and federal LHWCA insurance employers' miscellaneous or general liability throughout the United States.

Signal Mutual Indemnity Association, Ltd. is a group self-insurance facility authorized by the Secretary of Labor to secure the benefits payable under the LHWCA on a non-profit and cost effective basis for selected employers over the long term.

Amici collectively comprise the majority of insured and self-insured employers and insurance carriers subject to the Longshore and Harbor Workers' Compensation Act and a group self insurance facility, and thus have considerable expertise in adjudicating claims subject to the Act and adjudicating under the Petitioner's regulations and legal theories, since the creation of the agency.

Accordingly, *Amici* respectively move for leave to file the attached brief *amici curiae* in support of Respondent.

Respectfully submitted,

DENNIS J. LINDSAY
LINDSAY, HART, NEIL & WEIGLER
General Counsel
Master Contracting Stevedore Association of the Pacific Coast, Inc.
1300 S.W. Fifth Ave.
Suite 3400
Portland, OR 97201-5696
(503) 226-7677

CHARLES T. CARROLL, JR.*
THOMAS D. WILCOX
THOMAS D. WILCOX, P.C.
2011 Eye Street, N.W.
Suite 301
Washington, D.C. 20006
(202) 296-3005

* Counsel of Record

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. THE DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS DOES NOT HAVE STATUTORY STANDING TO SEEK REVIEW OF BENEFIT REVIEW BOARD FINAL ORDERS	5
A. DOL's Legislative Regulations Conflict With the LHWCA's Adjudicatory Scheme	5
B. The LHWCA Specifically Excludes the Federal Petitioner From Aggrieved Party Status and Standing To Invoke the Jurisdiction of the Courts of Appeals To Review BRB Final Orders	11
C. The Legislative History Relied Upon by the Federal Petitioner Is Unavailing	13
D. The Federal Petitioner Is a Legislative Authority Unto Itself	15
II. THE DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS HAS STANDING TO ENFORCE CERTAIN PROVISIONS OF THE LHWCA	18
III. THE DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS HAS THE SAME ARTICLE III STANDING AS ANY OTHER LITIGANT	20
CONCLUSION	21

TABLE OF AUTHORITIES

Cases: Page

Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988) 17
Cowart v. Nicklos Drilling Co., 505 U.S. —— (1992) 4, 16, 22
Director, OWCP v. Donzi Marine, Inc., 586 F.2d 377 (5th Cir. 1978) 11
Director, Office of Workers' Compensation Programs v. Greenwich Collieries, —— U.S. —— (1994) 4, 6, 22
Director, Office of Workers' Compensation Programs v. Perini North River Associates, Inc., 459 U.S. 297 (1983) 4
Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants, 17 F.3d 130 (5th Cir. 1994) 22
Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 (1992) 21
Morrison-Knudsen v. Director, Office of Workers' Compensation Programs, 461 U.S. 624 (1983) 4, 6, 16
Northeast Marine Terminal Co., Inc. v. Caputo, 432 U.S. 249 (1977) 4, 6, 10
P.C. Pfeiffer Co., Inc. v. Ford, 444 U.S. 69 (1979) 5
Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917) 5
Valley Forge Christian College v. Americans United For Separation Of Church and State, Inc., 454 U.S. 464 (1982) 21
Warth v. Seldin, 422 U.S. 490 (1975) 21

Constitution, Statutes, Regulations and Rules:

U.S. Constitution Art. III 14, 19, 20, 21
Administrative Procedures Act, 5 U.S.C. § 551 *et seq.* 6, 12
5 U.S.C. § 551 ..... 6, 17
5 U.S.C. § 701 17
5 U.S.C. § 702 16
Black Lung Benefits Act, 30 U.S.C. § 901 *et seq.*
30 U.S.C. § 932(k) 14, 15

TABLE OF AUTHORITIES—Continued

Page

Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.*
29 U.S.C. § 1132 13
Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*
33 U.S.C. § 902(1) 12
33 U.S.C. § 902(6) 12
33 U.S.C. § 902(7) 12
33 U.S.C. § 908(f) 7
33 U.S.C. § 918 18
33 U.S.C. § 919(c) 7
33 U.S.C. § 919(d) 7
33 U.S.C. § 921 ..... 9, 18
33 U.S.C. § 921(b) 8, 10
33 U.S.C. § 921(c) ..... *passim*
33 U.S.C. § 921a 9, 16
33 U.S.C. § 932 7
33 U.S.C. § 939(a) 6
33 U.S.C. § 939(c)(1) 8
33 U.S.C. § 941(b)(5) 19
33 U.S.C. § 944 ..... 7, 19
Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, P.L. 92-576, 86 Stat. 1251 6
Longshore and Harbor Workers' Compensation Act Amendments of 1984, P.L. 98-426, 98 Stat. 1639 4
Occupational Safety and Health Act, P.L. 91-598, 29 U.S.C. § 651 *et seq.*
29 U.S.C. § 660(a) 13
29 U.S.C. § 660(b) 13
Code of Federal Regulations
20 CFR § 701.201 7
20 CFR § 702.136 ..... 8, 18
20 CFR § 702.333 ..... 10, 18
20 CFR § 801.103 7
20 CFR § 801.104 7
20 CFR § 801.2(a)(10) 10
20 CFR § 802.410 ..... 10, 17, 18

TABLE OF AUTHORITIES—Continued

	Page
Federal Register	
38 *Federal Register* 2658 (Jan. 26, 1973)	10
38 *Federal Register* 26860 (Sept. 26, 1973)	10
42 *Federal Register* 16133 (March 25, 1977)	11
Federal Rules of Appellate Procedure	
Rule 15(a)	17
Rule 15(d)	19
Miscellaneous:	
Department of Justice Manual, Vol. 3, Title 4 Civil Division (1994-1 Supplement)	21
H. Rept. 92-1441, 92nd Congress, 2nd Sess. (1972)	6, 8
S. Rept. 92-1125, 92nd Congress, 2nd Sess. (1972)	6, 8
S. Rept. 95-209, 95th Cong., 1st Sess. (1977)	14
Secretary of Labor's Order No. 1-90 [55 *Federal Register* 9033 (1990)]	19
OWCP *Annual Report To Congress FY 1993*, U.S. DOL, Employment Standards Administration, Office of Workers' Compensation Programs	7

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

No. 93-1783

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Petitioner,
v.
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, *et al.*,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICI CURIAE ON BEHALF OF THE NATIONAL ASSOCIATION OF WATERFRONT EMPLOYERS, MASTER CONTRACTING STEVEDORE ASSOCIATION OF THE PACIFIC COAST, INC., THE ALLIANCE OF AMERICAN INSURERS, AND SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD. IN SUPPORT OF RESPONDENT

THE INTERESTS OF AMICI CURIAE

The National Association of Waterfront Employers (NAWE), formerly the National Association of Stevedores (NAS), is a not-for-profit tax exempt [26 U.S.C. § 501(c)(6)] trade association organized under the laws of the District of Columbia whose 33 member companies are stevedore contractor/marine terminal operators doing business on all four of the nation's seacoasts, the states of Alaska and Hawaii, and the Commonwealth of Puerto

Rico. With the exception of the Puerto Rico members, every NAWE member company employs longshore labor engaged in maritime employment subject to the Longshore and Harbor Workers' Compensation Act (LHWCA).

The Master Contracting Stevedore Association of the Pacific Coast, Inc. (MCSA) is a not-for-profit trade association whose 15 member companies provide contract stevedoring services in all principal ports in the states of California, Oregon and Washington, and provide substantially all the marine terminal and stevedoring services performed by private contractors to ocean-going vessels calling at ports in those states. MCSA member companies employ a work force of approximately 10,000 longshoremen and clerks who are engaged in maritime employment subject to the LHWCA.

The Alliance of American Insurers is an association of 214 insurance companies whose member companies write property and casualty insurance, including state workers' compensation and federal LHWCA insurance, employers' miscellaneous or general liability throughout the United States.

Signal Mutual Indemnity Association, Ltd. is a group self-insurance facility authorized by the Secretary of Labor to secure the benefits payable under the LHWCA on a non-profit and cost effective basis for selected employers over the long term.

Amici collectively comprise the majority of insured and self-insured employers and insurance carriers subject to the Longshore and Harbor Workers' Compensation Act and a group self insurance facility, and thus have considerable expertise in adjudicating claims subject to the Act and adjudicating under the Petitioner's regulations and legal theories, since the creation of the agency.

SUMMARY OF ARGUMENT

Despite the Federal Petitioner's assertion that the Longshore and Harbor Workers' Compensation Act ("LHWCA") and its regulations confer statutory standing on the Director, Office of Workers' Compensation Programs to seek appellate review of final compensation orders issued by the Department of Labor, a close reading of the Act, particularly the amendments made by Congress in 1972, reveals otherwise. The Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, P.L. 92-576, 86 Stat. 1251, clearly set forth a comprehensive regulatory scheme and specifically delegate a limited adjudicative role to the Secretary of Labor and limited subject matter jurisdiction to the federal appellate courts. Included in this limited delegation is the question of which parties have statutory standing to invoke the jurisdiction of the courts of appeals to seek review of the Department's own final administrative orders. The LHWCA is unambiguous on this point; the Federal Petitioner is simply not one of these parties.

Indeed, while apparently having been overlooked by every circuit court to have considered the question thus far, the LHWCA contains a specific definition of "person" that, in turn, clearly limits which parties can be "adversely affected or aggrieved *persons*" for purposes of invoking the jurisdiction of the appellate courts. The Secretary of Labor/Director, Office of Workers' Compensation Programs, not being an "individual, partnership, corporation, or association" clearly falls outside this statutory definition of "person." Therefore, read and applied properly, an unambiguous LHWCA simply does not confer statutory standing upon the Federal Petitioner. In this regard, the LHWCA is entirely consistent with the judicial review provisions of the Administrative Procedures Act ("APA").

More importantly, as the federal courts are courts of limited jurisdiction, the appellate courts are without statu-

tory jurisdiction to entertain an appeal of an agency final order from a non-aggrieved person, such as the Federal Petitioner. The Federal Petitioner's regulations and arguments, in effect, seek to expand the jurisdiction of the federal appeals courts.

Notwithstanding the Secretary's limited adjudicatory role, the Federal Petitioner has openly ignored those provisions of the 1972 Amendments and the subsequent Congressional Amendments made in 1984 [1] that it finds inconvenient, e.g., the incorporation of the Administrative Procedures Act, see *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, —— U.S. —— (1994); or has attempted to rewrite the statute through expansive regulations and/or *ad hoc* litigating positions in the courts of appeals at the expense of the Congressionally mandated scheme. See *Cowart v. Nicklos Drilling Co.*, 505 U.S. —— (1992); *Morrison-Knudsen v. Director, Office of Workers' Compensation Programs*, 461 U.S. 624 (1983).

The Department's regulatory revisionism could not be better illustrated than by the muddled jurisprudence put forth in the Federal Petitioner's Brief. Only by intertwining unambiguous LHWCA statutory directives and conflicting regulations that are promulgated solely to enhance Petitioner's authorized role in the process, at the expense of the statutory scheme, can Petitioner advance her standing theories.

This is not the first time that this Court has noted but left unresolved the standing question. It has caused considerable confusion since the initial judicial interpretations of the 1972 Amendments. See, e.g., *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 256 n.11 (1977); *Director, Office of Workers' Compensation Programs v. Perini North River Associates, Inc.*, 459 U.S. 297, 303 n.11 (1983). This Court can finally resolve the issue simply by applying the unambiguous language of the LHWCA and the APA, and affirming the decision below.

[1] The Longshore and Harbor Workers' Compensation Act Amendments of 1984, P.L. 98-426, 98 Stat. 1639.

ARGUMENT

I. THE DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS DOES NOT HAVE STATUTORY STANDING TO SEEK REVIEW OF BENEFIT REVIEW BOARD FINAL ORDERS.

Contrasting the underlying adjudicatory scheme of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* ("LHWCA"—"Act") with the Department of Labor's ("DOL") subsequent regulations exposes the fact that the Federal Petitioner consistently oversteps her authorized adjudicatory role delegated by Congress in 1972. A close reading of the two schemes leads to the inescapable conclusion that the Petitioner's confusing and insupportable regulations simply ignore an unambiguous statutory scheme. Included in her regulations are several provisions bearing on the precise question of statutory standing now before this Court—including a *regulation* granting appellate standing to the Federal Petitioner, notwithstanding specific LHWCA language to the contrary!

A. DOL's Legislative Regulations Conflict With the LHWCA's Adjudicatory Scheme.

The LHWCA is a federal workers' compensation statute enacted by Congress in response to this Court's opinion that state compensation statutes could not constitutionally reach injuries incurred upon the navigable waters of the U.S. *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917). Congress modeled the Act after the N.Y. State Workmen's Compensation law but designed it to recompense certain classes of maritime workers for the loss of earnings due to injuries sustained during covered employment. *P.C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69

(1979); *Morrison-Knudsen v. Director OWCP*, 461 U.S. 624 (1983). The Act was largely revised by Congress in 1972 in an attempt to reconcile the competing interests comprising the maritime industry, and produce a compensation scheme fair to one and all of these private sector interests. *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, (1977).

Any analysis of Petitioner's standing argument must start with the 1972 reform of the Act's adjudicatory procedures. Congress found the then existing dispute resolution process wanting because it "[Failed] to keep separate the functions of administering the program and sitting in judgment on the hearings[.]" H. Rept. 92-1441, p. 11, 92nd Congress, 2nd Sess.; S. Rept. 92-1125, p. 13-14, 92nd Congress, 2nd Sess.

To cure this defect Congress substantially overhauled the Act's entire dispute resolution process with the enactment of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, P.L. 92-576, 86 Stat. 1251, ("1972 Amendments"). Included amongst these reforms was the application of the Administrative Procedures Act, 5 U.S.C. § 551 *et seq.*, to all hearings conducted within the Department, *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, —— U.S. —— (1994); the creation of an administrative review agency, the Benefits Review Board ("BRB"), within the operational control of the DOL, *Caputo* at 254, n.3; and a recommendation that the Secretary of Labor "take full advantage of the requirement of separating the functions. . . . to consider a complete reorganization . . ." S. Rept. 92-1125, p. 14; H. Rept. 92-1441, p. 11.

The amended LHWCA presently directs the Secretary of Labor ("Secretary") to "*administer* the provisions of the Act" and authorizes him "to make such rules and regulations . . . as may be necessary in the *administration* of this Act." 33 U.S.C. 939(a). The Secretary in turn

has delegated "all functions . . . with respect to the administration or benefits programs" of the Act to the Office of Workers' Compensation Programs ("OWCP") and designated a Director ("Director") to administer the program, 20 CFR § 701.201. The reorganization requested by Congress, as noted above, became complete with the Secretary's placement of the "quasi-judicial" BRB in the Office of the Deputy Secretary, along with the rulemaking power of this "independent" agency. 20 CFR §§ 801.103 and 801.104.

Among the Director's principal day to day administrative functions are: the initial handling and investigation of claims, 33 U.S.C. § 919(c), the assignment of disputed claims to ALJs for resolution, 33 U.S.C. § 919(d); administering the LHWCA § 44, 33 U.S.C. § 944, Special Trust Fund, designed primarily to encourage the hiring of disabled workers as set forth in LHWCA § 8(f), 33 U.S.C. § 908(f)[2]; and authorizing insurance carriers and self-insured employers to assume LHWCA risk, and fixing the latter's financial reserves to cover any possible default on claims obligations, 33 U.S.C. § 932.[3]

Under the amended LHWCA Act there is no provision for the Department to initiate a claim or to become a party to a claim during administrative proceedings under the guise of representing the Director. The 1972 Amendments only authorize the Secretary to provide "legal *assistance . . . in processing a claim*" to claimants "upon

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[2] In Calendar year 1993 the § 44 Special Trust Fund collected over $102 million dollars in assessments from covered employers and insurance carriers, and paid out over $103 million dollars to some 4,652 second injury fund claimants and others qualifying for secondary § 44 benefits. *OWCP Annual Report To Congress FY 1993*, U.S. DOL, Employment Standards Administration, Office of Workers' Compensation Programs.

[3] Currently The Director, OWCP has custody of nearly $2 billion in collateral from authorized self-insured employers.

request." 33 U.S.C. § 939(c)(1) (emphasis added).[4] Despite the fact that this language clearly does not authorize representation of claimants at either the ALJ or BRB level, or in the appellate courts, it blossomed in subsequent OWCP implementing regulations to become "Legal *representation* of the claimant in *adjudicatory* proceedings may be furnished in cases in which the Secretary's interest in the case is not adverse to that of the claimant." 20 CFR § 702.136. (emphasis added).[5]

At the administrative hearing level the 1972 Amendments authorize appeals to the BRB of ALJ decisions presenting questions of law or fact, but only by any "party in interest." 33 U.S.C. § 921(b)(3). Given the further statutory directive that the BRB need not obtain the consent of the "parties in interest" to remand an ALJ decision, but rather may do so "on its own motion or at the *request of the Secretary*" it is absolutely clear that Congress never intended to make the Secretary/Director a party in interest at the administrative hearing level. In

[4] 33 U.S.C. § 939(c)(1) reads as follows: "(c)(1) The Secretary shall, upon request, provide persons covered by this Act with information and assistance relating to the Act's coverage and compensation and the procedures for obtaining such compensation including assistance in processing a claim. The Secretary may, upon request, provide persons covered by this Act with legal assistance in processing a claim. The Secretary shall also provide employees receiving compensation information on medical, manpower, and vocational rehabilitation services and assist such employees in obtaining the best such services available." *Amici* note that in the instant case the claimant below specifically declined to further participate after the Circuit Court rendered its decision.

[5] Evidently the Federal Petitioner is not comfortable in defending the obvious discrepancy between 33 U.S.C. § 939(c)(1) and 20 CFR § 702.136 because the latter is entirely ignored on brief. Perhaps this is also due to the fact that both the Senate and House Reports suggest that assistance, whatever its nature, be limited to "needy cases" or "where the employee is either indigent or of minimal means." S. Rept. 92-1125, p. 15, 92nd Congress, 2nd Sess. and H. Rept. 92-1441, p. 13, 92nd Congress, 2nd Sess.

fact, the Federal Petitioner's sole statutory role in the entire dispute resolution process is to seek remand at the BRB level of an ALJ decision with which it disagrees. 33 U.S.C. § 921(b)(4).

Another key provision of the 1972 Amendments expressly authorizes attorneys appointed by the Secretary to represent the Secretary/Director and the BRB "[]in any *court* proceedings under § 21 or other provisions of this Act . . .", other than those before this Court. 33 U.S.C. § 921a (emphasis added).[6] In turn, LHWCA § 21 authorizes only two distinct court proceedings, both concerning final compensation orders: § 21(c) authorizes appellate review of a final BRB order sought by "adversely affected or aggrieved 'persons' "—*which statutory definition specifically excludes the Secretary of Labor*—see discussion below at I-B, and enforcement actions of unpaid final orders, to U.S. District Courts, § 21(d). The question of standing to invoke appellate court jurisdiction to review under § 21(c) is the real issue before this Court.

Undeterred by the unambiguous statutory restrictions found at 33 U.S.C. §§ 921(b)(3) and (4) and 921(c), as noted above, OWCP's implementing regulations later mushroomed, *sub silentio*, to "[T]he Solicitor of Labor

[6] LHWCA § 21a reads as follows: "Attorneys appointed by the Secretary shall represent the Secretary, the deputy commissioner, or the Board in any court proceedings under § 21 or other provisions of this Act except for proceedings in the Supreme Court of the United States." 33 U.S.C. § 921a. The Federal Petitioner interprets "represent" to mean "participate," and thus authorizing participation and standing to seek appellate review of the Department's own final administrative orders. Pet. Br. at 14. *Amici* submit that this construction of the Act stands the logic behind administrative law—final agency action followed by judicial review sought by an aggrieved person—on its head. Under Petitioner's construction, final *agency* action is simply not final because Petitioner can continue to litigate against a disfavored party in the appellate courts.

. . . may appear and participate *in any formal hearing* held pursuant to these regulations on behalf of the Director as an interested party." 20 CFR § 702.333 (emphasis added).[7] Not to be outdone, BRB regulations also granted party in interest status to the Secretary or his designee. 20 CFR § 801.2(a)(10).

Later still, after certain Courts expressed confusion as to whether the BRB or the Director was the proper party for purposes of judicial review, or even if the DOL had standing in the first place, see, e.g., *Caputo*, 432 U.S. 249 n.11 (1977), the Secretary attempted to cure this confusion by permitting "any party adversely affected or aggrieved . . . to petition for review . . ." and "deeming" the Director, OWCP "the proper party . . . for all review proceedings conducted pursuant to § 21(c) of the LHWCA." 20 CFR § 802.410.[8] This was done in a typically obscure manner, i.e., in BRB regulations, vice

[7] Proposed Regulations found at 38 *Federal Register* 2658 (Jan. 26, 1973) for the 1972 adjudication scheme first contained the following provision: "§ 702.333 Formal hearings; parties. The necessary parties for a formal hearing are the claimant and the employer or insurance carrier, and the administrative law judge assigned the case." The final regulation, *promulgated without notice or opportunity to comment* at 38 *Federal Register* 26860 (Sept. 26, 1973), redesignated the original provision as "(a)" and added a new subsection "(b)" as follows:

"(b) The Solicitor of Labor or his designee may appear and participate in any formal hearing held pursuant to these regulations on behalf of the Director as an interested party."

[8] 20 CFR § 802.410 reads as follows: "Judicial review of Board decisions. (a) Within 60 days after a decision by the Board has been filed pursuant to § 802.403(b), any party adversely affected or aggrieved by such a decision may file a petition for review with the appropriate U.S. Court of Appeals pursuant to § 21(c) of the LHWCA. (b) The Director, OWCP, as the designee of the Secretary responsible for the administration and enforcmeent of the statutes listed in § 802.101, shall be deemed to be the proper party on behalf of the Secretary of Labor in all review proceedings conducted pursuant to § 21(c) of the LHWCA."

OWCP regulations. See 42 *Fed. Reg.* 16133 (March 25, 1977).

Since 1972 the Department has promulgated this unauthorized maze of regulations solely to enhance the Federal Petitioner's role in LHWCA adjudications over and above that actually provided for by the Act's dispute resolution scheme, and contrary to Congress' intent to separate the Act's adjudicatory and administrative functions. The Federal Petitioner's standing argument depends entirely upon intertwining the statutory scheme and conflicting Departmental regulations, and misleading the appellate courts in the process. It appears that the Federal Petitioner has been quite successful in so doing, judging from post 1972 litigation, even to the point of expanding federal appellate court jurisdiciton beyond that delegated by Congress in LHWCA § 21(c).

In addition to her unauthorized regulations, the Federal Petitioner has chosen to ignore the key statutory provision governing which parties have standing to seek appellate review and which do not, discussed immediately below.

B. The LHWCA Specifically Excludes the Federal Petitioner From Aggrieved Party Status and Standing To Invoke the Jurisdiction of the Courts of Appeals To Review BRB Final Orders.

While apparently not noticed by the Court below or any other circuit court to consider the question of standing, see e.g., *Director, OWCP v. Donzi Marine, Inc.*, 586 F.2d 377 (5th Cir. 1978), the LHWCA could not be more unambiguous as to which parties have standing to seek review of BRB orders and which do not.[9]

As repeatedly pointed out by the Federal petitioner, the LHWCA confers standing on "any *person* adversely af-

[9] The Court below raised the issue on its own, and thus did not have the benefit of briefs from those who deal with the statute on a daily basis and are thus familiar with the minutiae of the Act.

fected or aggrieved" by a final order of the BRB to seek review of that order in the appropriate court of appeals. LHWCA § 21(c), 33 USC § 921(c).[10]

However, while both unremarked below and absent from Petitioner's Brief, the fact is that § 2(1) of the LHWCA specifically defines the term "person." This section clearly limits person to an "[] individual, partnership, corporation, or association." 33 U.S.C. §902(1). Obviously this limitation specifically excludes the Secretary of Labor and deputy commissioners, terms also defined respectively by §§ 2(6) and 2(7) of the Act, from becoming " 'persons' adversely affected or aggrieved" for purposes of seeking § 21(c) appellate review.

The conclusion that the LHWCA denies the Federal Petitioner access to the appellate courts to seek review of the Department's own final orders is inescapable given this fundamental definition of who can be an aggrieved person authorized to invoke the jurisdiction of the appellate courts. Federal Petitioner's muddled jurisprudence is designed to obfuscate this fact.

The 1972 Amendments limit the Secretary's dispute resolution role to the administrative adjudication of disputes between private parties. Only one or more of these private litigants may become aggrieved by a final order of the BRB, and thus have standing to seek appellate review under the LHWCA § 21(c). LHWCA review is thus entirely consistent with the judicial review norms and procedures of the Administrative Procedures Act ("APA"). See I-D and n.13, *infra*. The Act's judicial review provisions round out the LHWCA adjudicatory scheme, and complete Congress' goal of separating the Act's adjudicatory and administrative functions.

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[10] 33 U.S.C. § 921(c) reads as follows: "Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred, . . ."

Federal Petitioner's LHWCA role is exactly like that of the industrial commissioner under the N.Y. State Workers' Compensation Law or, for that matter, every state administrative agency charged with enforcing a state compensation law. To the best of *Amici*'s knowledge, not one of these state agencies has statutory standing to choose sides in a compensation dispute between private parties and seek appellate review of its own final administrative determination. And neither do any of those independent federal agencies alluded to in Petitioner's list of cases submitted on Brief at 15.

By way of contrast, Congress knows how to confer standing on the Secretary of Labor when a statutory scheme so dictates. E.g., when Congress considered and passed the Occupational Safety and Health Act, P.L. 91-598, two years before overhauling the LHWCA in 1972, Congress specifically conferred standing on the Secretary to obtain review of any final order issued by the Occupational Safety and Health Review Commission, along with "persons adversely affected or aggrieved" by final Commission orders. 29 U.S.C. §§ 660(a) and (b). Statutory standing here should come as no surprise given the Secretary's *prosecutorial* function, a feature of the OSH Act clearly not found in the LHWCA. See also the enforcement provisions of the Employee Retirement Income Security Act, 29 U.S.C. § 1132, P.L. 93-406, enacted two years after the 1972 Amendments.

C. The Legislative History Relied Upon by the Federal Petitioner Is Unavailing.

The Federal Petitioner contends that "Congress could hardly have intended [the 1972 Amendments] to divest the Act's administrator of her pre-1972 authority to seek review . . . on . . . claims that are adverse to her position." Pet. Br. at 27. Congress, of course, did exactly that with the 1972 reforms to the Act's adjudicatory scheme, which fully accomplished the drafters' stated in-

tention to "separate the functions" within the Labor Department. As outlined above, the 1972 Amendments split the Act's adjudicatory functions, i.e., administrative adjudication/internal review/ and judicial review of final agency orders, from the Director's administrative functions, thus placing the agency on the same established administrative law footing as other federal agencies with combined law enforcement responsibilities.

The Petitioner counters the LHWCA's unambiguity with language in a Senate Report dealing with the 1978 Amendments to the Black Lung Benefits Act, 30 U.S.C. § 901 *et seq.*, stating that "the Secretary's interest . . . should be deemed sufficient to confer standing[]" Pet. Br. at 29, quoting S. Rept. 95-209, 95th Congress, 1st Sess., 21-22 (1977). The Petitioner gleans from this that the "Director's interest in the resolution of compensation claims is sufficient to confer standing to appeal." Pet. Br. at 28. This "unambiguous expression of congressional intent," as the Petitioner labels the Senate Report, Pet. Br. at 30, appears to *Amici* to be both an admission that statutory standing is indeed not conferred on the Secretary/Director, as *Amici* demonstrate above at I-A and B, and a claim of Article III standing based on the regulatory nexus between the Director's responsibilities and the Act.

Amici submit that the Senate Labor Committee is no better positioned to "deem" Article III standing than is the Secretary in BRB regulations. See I-A and n.8. Neither has the constitutional provenance to do so, whether in a committee report or in legislative regulations. To be sure, Congress certainly may enact a statute permitting designated parties to invoke the jurisdiction of a specified court, but only within Article III "case or controversy" bounds. Congress did so in the LHWCA, as noted above, and the Federal Petitioner is not one of those designated parties.

Amici further note that this "legislative history" appeared in Committee reports written 5 years after enactment of the 1972 Amendments and, while it deals with amending a statute that shares a common dispute resolution process, that statute is three Code Titles removed from the LHWCA. Furthermore, *Amici* submit that the similarity of purpose and proximity of this Senate Report to the BRB regulation, both appeared in 1977, raises the specter of entirely bogus legislative history. Moreover, Congress could certainly have rewritten the LHWCA scheme in a fashion that would have given the Federal Petitioner statutory standing to seek review when the LHWCA was later amended in 1984, but chose not to do so.[11]

D. The Federal Petitioner Is a Legislative Authority Unto Itself.

The DOL/OWCP/BRB is, on its face, a typical unitary agency, combining rulemaking, enforcement, and administrative adjudications under one roof. However, unlike those federal law enforcement agencies that perform both prosecutorial and adjudicatory functions, the Department's primary LHWCA function is the adjudication of contested claims between two or more *private* parties using the Agency's published regulations and procedures. OWCP is not a prosecutor. As demonstrated above at I-A and B, the Federal Petitioner's regulations fail to make this distinction; the LHWCA does not.

As noted above at I-A and n.6, § 21a of the Act requires the Secretary to appoint attorneys to represent the

[11] E.g., along the lines of the Black Lung Benefits Act, 30 U.S.C. § 901, *et seq.* This Act specifically makes the Secretary a party in any claim proceeding. 30 U.S.C. § 932(k). Given the BLBA's financing mechanism for the payment of benefits, a mandatory trust fund administered by the Secretary, Congress understood that authorizing statutory standing is critical in order to protect the integrity of the fund. This is wholly different than the principal payment scheme of the LHWCA, which is employer/carrier to claimant.

Director and the BRB in any authorized court proceedings. In practice both the OWCP and the "quasi-independent" BRB share the same attorneys and legal advice from the Office of the Solicitor of Labor.[12] If this commingling of functions at the legal advisory level is not an outright conflict of interest or failure of procedural due process, at the very least it explains the Department's ongoing propensity to enhance its adjudicatory role at the expense of both the LHWCA and federal administrative law.

Not content to rewrite the adjudicatory provisions of the LHWCA, as noted above, the Federal Petitioner's regulations and standing arguments also eviscerate the judicial review provisions of the Administrative Procedures Act, 5 U.S.C. § 701 *et seq.*, and make a mockery of Rule 15(a) of the Federal Rules of Appellate Procedure. The former mirrors the review provisions of the LHWCA, by denying an agency standing to seek judicial review of its own final administrative orders, and thus the opportunity, in effect, to continue to prosecute a disfavored party.[13] The latter designates the agency in fact

[12] § 21a of the Act only requires the Secretary to appoint attorneys to represent the Director and the BRB. There is no requirement that these attorneys be one and the same. Given the legislative history outlined above in I-A, it is clear that Congress expected a division of responsibility at the legal advisory level as well as a complete separation of adjudication and administrative responsibilities within the Agency. This division never occurred. *Amici* submit that this is the flaw in the administration of the Act that, in turn, leads to recurring litigation flip-flops and other embarrassments before this Court. See, e.g., *Morrison-Knudson* at 645 ("The Director has now switched sides. Of course, agencies often make mistakes and disavow prior positions. . ."); *Cowart v. Nicklos Drilling Co.*, 505 U.S. —— (1992) (slip opinion at 6) ("[T]he Director of the OWCP and the Department of Labor have altered their position. . . .").

[13] 5 U.S.C. § 702 entitles a "*person* suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute" to seek judicial

responsible for the final order affecting the private litigants, as the proper and necessary federal respondent; in LHWCA adjudications this can only be the "quasi independent" BRB. Nothing in the LHWCA is to the contrary. However, the Federal Petitioner's regulations are. 20 CFR § 802.410(b) "deems" the Director, as the designee of the Secretary, the proper party "in all review proceedings conducted pursuant to § 21(c) of the LHWCA."[14]

It is axiomatic that the Secretary cannot assume legislative powers not delegated by Congress. *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988). *Amici* submit that the Secretary has indeed done so. The Federal Petitioner's legislative regulations go well beyond a permissible construction of the congressional directives to the Secretary to: provide legal assistance in processing claims; appoint attorneys to represent the Secretary and the BRB in designated *court* proceedings; and seek remand of BRB decisions with which the Secretary/

review. 5 U.S.C. § 701, in turn, applies the definition of person found in 5 U.S.C. § 551, which limits "person" to a slightly broader class than that found under the LHWCA, but still excludes federal agencies. Considering that the Federal Petitioner took the position in *Greenwich Collieries* that the APA doesn't apply to LHWCA adjudications, it should come as no surprise that she also chooses to ignore the judicial review standards of the APA.

[14] Taken to its logical conclusion, FRAP Rule 15(a), read together with the Federal Petitioner's regulations governing appellate standing, as noted above, could well lead to the ultimate absurdity, i.e., *Director, OWCP v. Director, OWCP*, not a very beneficial way of spending the taxpayer's funds and certainly not invited by the drafters of the LHWCA or the APA. This is not as far fetched as it might seem. See, e.g., *Shahady v. Atlas Tile & Marble Co.*, 673 F.2d 479 (1982) (holding that the Director, OWCP "shall be named as federal party respondent in all petitions for review. . . ."). Thus far the courts have bought the Department's regulatory view, even though it leaves the BRB an orphan whenever review takes place, unless the Director happens to agree with the Board's final order.

Director disagrees. By promulgating the regulations noted above, particularly those found at 20 CFR § 702.136 (authorizing legal representation in adjudicatory proceedings), § 702.333(b) (granting Director party status), and § 802.410 (granting Director appellate standing), the Federal Petitioner has chosen to ignore both the unambiguous adjudicatory procedures proscribed by Congress in 1972 and the judicial review provisions of the Administrative Procedures Act. It has in fact become a legislative authority unto itself.

Only this Court can effectively return the DOL/OWCP back to the norms of administrative law. The agency, by whatever nomenclature, is a federal agency subject to the proscriptions of Congress and the Federal Rules of Appellate Procedure.

II. THE DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS HAS STANDING TO ENFORCE CERTAIN PROVISIONS OF THE LHWCA.

In reaching its decision the Court below ignored each and every one of the Federal Petitioner's regulations noted above, as indeed it must, given the fact that they do not reflect the LHWCA's adjudicatory scheme. The Court—correctly—distinguished those interests of the Director that would support appellate standing, couching them in terms of the Director's "pecuniary/economic" or "legitimate administrative" interests.

Amici submit that a more logical distinction would be along the lines of the Director's bona-fide law *enforcement* actions. Besides the adjudicatory and administrative functions assigned the Secretary, as noted above, the LHWCA requires enforcement of certain specified statutory functions: e.g., compensation orders whenever an employer fails to comply with an order, 33 U.S.C. § 921(d) or defaults in the payment due under any award, 33 U.S.C. § 918: Special Fund rights and protections

under 33 U.S.C. § 944(d)(1) and (3): and safety rules and regulations, 33 U.S.C. § 941(b)(5), largely overtaken by the passage of the Occupational Safety and Health Act in 1970 and thus delegated to the Assistant Secretary for Occupational Safety and Health. See Secretary of Labor's Order No. 1-90 [55 *Federal Register* 9033 (1990)].

Each of these enforcement activities is clearly spelled out as such by the plain language of the LHWCA and directed to U.S. District Courts. Together these provisions provide the Director a wide array of remedies sufficient to carry out her enforcement responsibilities. This is unchanged from the pre-1972 enforcement scheme, before Congress intentionally separated the adjudicatory functions, i.e., adjudication/administrative review/appellate review, from the Department's administrative responsibilities in the 1972 Amendments. Moreover, none of these activities is likely to be raised by an aggrieved person in a § 21(c) appeal.

Obviously the Director is authorized to conduct these enforcement activities in U.S. District Courts and seek review of trial court decisions in the appellate courts as necessary, and may do so utilizing attorneys appointed by the Secretary under the "other provisions of this Act" language of LHWCA § 21(a). Furthermore, should an enforcement issue, such as the protection of the Special Fund, arise in the context of a LHWCA § 21(c) appeal, as it did below, the Federal Petitioner can seek to intervene pursuant to FRAP Rule 15(d) in order to protect her enforcement obligations. Alternatively, the Federal Petitioner can seek appellate court review should she suffer "injury in fact" sufficient to meet Article III case or controversy requirements, see III below, and identify a statutory basis, other than § 21(c), for that jurisdiction.

Amici submit that the Director's enforcement obligations and her economic interests are one and the same. Therefore, unlike the § 21(c) standing issue now before

this Court, *Amici* do not question the Director's standing regarding any of these statutory enforcement activities.

III. THE DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS HAS THE SAME ARTICLE III STANDING AS ANY OTHER LITIGANT.

In addition to the muddled statutory/regulatory standing argument outlined on Brief, Petitioner asserts that the Secretary, through his designee, the Director, Office of Workers' Compensation Programs, is the administrator of the Longshore and Harbor Workers' Compensation Act, with statutory authority to implement regulations. Therefore, Petitioner appears to be arguing that this regulatory nexus alone is sufficient to confer Article III standing on the Secretary/Director to seek appellate review of all BRB decisions as a matter of right "to advance . . . the public interest, to efficient[ly] . . . administer and enforce" the Act, and to protect 'societal interests.' Pet. Br. at pp. 18, 19 and 24, respectively.

As noted above, in the present case the relevant statutes —the LHWCA and the APA—specifically deny standing to the Secretary to seek review of a § 21(c) dispute between aggrieved persons. More importantly, this LHWCA provision, relied upon below by the Federal Petitioner for subject matter jurisdiction, by its clear terms withholds such jurisdiction from the appellate courts. Appellate courts simply may not entertain appeals from persons not specifically designated aggrieved by § 21(c), such as the Federal Petitioner.

So the question then becomes—does the Federal Petitioner ever meet the Article III requirements necessary to invoke the jurisdiction of the appellate courts and, if so, under what circumstances? The Congressional delegation of standing/court jurisdiction, or the lack thereof, are solely questions for that federal courts. Neither may be "deemed" by regulation or Senate Report, as the Petitioner argues.

The Federal Petitioner, like any other litigant, must suffer an injury in fact satisfying the case or controversy requirements of Article III in order to invoke the jurisdiction of the courts, if so provided by Congress.[15] In this case, as the court below noted, the Federal Petitioner has neither suffered a "distinct and palpable" injury, *Valley Forge Christian College v. Americans United For Separation Of Church and State, Inc.*, 454 U.S. 464, 475 (1982); *Warth v. Seldin*, 422 U.S. 490, 501 (1975), nor a "concrete and particularized, actual or imminent invasion of a legally protected interest," *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2134 (1992) and therefore is without Article III standing to appeal a final order of the BRB outside the context of a § 21(c) appeal. *Amici* submit that the Director's regulatory nexus theory, like the "animal" nexus and "vocational" nexus found "beyond all reason" in *Lujan*, is insufficient to meet Article III standing requirements.

On the other hand, the Director may well incur injury in fact sufficient to confer Article III standing in certain circumstances, e.g., whenever a BRB order conflicts with her delegated statutory enforcement responsibilities, as noted above at II, providing she can first identify a statutory basis conferring appellate jurisdiction other than that denied her by LHWCA § 21(c).

CONCLUSION

In 1972, Congress set forth a specific method of adjudicating claims under the LHWCA, which includes a clearly defined role for the Federal Petitioner. The LHWCA scheme is entirely consistent with the APA. Notwithstanding both of these statutory dictates, the Federal Petitioner has usurped her authorized authority by

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[15] See, e.g., the *Department of Justice Manual*, Vol. 3, Title 4-2.130, Standing to Sue, Civil Division, 1994-1 Supplement. ("The case or controversy clause of Article III of the Constitution imposes a minimal constitutional standing requirement *on all litigants* attempting to bring suit in federal court.") (emphasis added).

carving out an enhanced role for herself through unauthorized legislative regulations. Central to this role is her claim of standing to invoke the jurisdiction of federal appellate courts to review the Department's own final administrative orders. There is nothing novel in Petitioner's contention. It has become comonplace for her to ignore inconvenient statutory directives. See, e.g., *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, —— U.S. —— (1994); *Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants*, 17 F.3rd 130 (5th Cir. 1994).

However, as demonstrated above, neither the LHWCA nor the APA provide the Federal Petitioner with such statutory standing, or the federal appeals courts with the jurisdiction to entertain an appeal from her in these circumstances. To do so would stand the logic of administrative law, i.e., final agency action followed by judicial review, on its head.

Therefore, *Amici* submit that the decision below is correct on the basis of both the plain language of the LHWCA and the APA. As this Court has held repeatedly, "The controlling principle . . . is the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written." *Cowart v. Nicklos Drilling Co.*, 505 U.S. —— (1992) (slip opinion at 6).

The decision below, *Amici* respectfully submit, must therefore be affirmed.

Respectfully submitted,

DENNIS J. LINDSAY
LINDSAY, HART, NEIL & WEIGLER
General Counsel
Master Contracting Stevedore Association of the Pacific Coast, Inc.
1300 S.W. Fifth Ave.
Suite 3400
Portland, OR 97201-5696
(503) 226-7677

CHARLES T. CARROLL, JR.*
THOMAS D. WILCOX
THOMAS D. WILCOX, P.C.
2011 Eye Street, N.W.
Suite 301
Washington, D.C. 20006
(202) 296-3005

*Counsel of Record

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In the Supreme Court of the United States

OCTOBER TERM, 1994

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

THOMAS S. WILLIAMSON, JR.
Solicitor of Labor
Department of Labor
Washington, D.C. 20210

TABLE OF AUTHORITIES

Cases: Page

Albemarle Paper Co. v. *Moody*, 422 U.S. 405 (1975) 2
Carozza v. *United States Steel Corp.*, 727 F.2d 14 (3d Cir. 1984) 10
Director, OWCP v. *Cargill, Inc.*, 718 F.2d 886 (9th Cir. 1983) 17
Director, OWCP v. *Eastern Coal Corp.*, 561 F.2d 632 (6th Cir. 1977) 10
Director, OWCP v. *General Dynamics Corp.*, 982 F.2d 790 (2d Cir. 1992) 17
Director, OWCP v. *Greenwich Collieries*, 114 S. Ct. 2251 (1994) 17-18
Director, OWCP v. *National Van Lines, Inc.*, 613 F.2d 972 (D.C. Cir. 1979), cert. denied, 448 U.S. 907 (1980) 17
Director, OWCP v. *Newport News Shipbuilding & Dry Dock Co.*, 676 F.2d 110 (4th Cir. 1982) 17
Director, OWCP v. *Rochester & Pittsburgh Coal Co.*, 678 F.2d 17 (3d Cir. 1982) 15
Far East Conference v. *United States*, 342 U.S. 570 (1952) 16
General Tel. Co. v. *EEOC*, 446 U.S. 318 (1980) 5
Gibas v. *Saginaw Mining Co.*, 748 F.2d 1112 (6th Cir. 1984), cert. denied, 471 U.S. 1116 (1985) 10
INS v. *Chadha*, 462 U.S. 919 (1983) 12
Ingalls Shipbuilding Div. v. *White*, 681 F.2d 275 (5th Cir. 1982) 12
International Primate Protection League v. *Administrators of Tulane Educ. Fund*, 500 U.S. 72 (1991) 16
Kalaris v. *Donovan*, 697 F.2d 376 (D.C. Cir.), cert. denied, 462 U.S. 1119 (1983) 9-10
McCord v. *Benefits Review Bd.*, 514 F.2d 198 (D.C. Cir. 1975) 7
Maine v. *Taylor*, 477 U.S. 131 (1986) 12
Martin v. *OSHRC*, 499 U.S. 144 (1991) 11
Monell v. *Department of Social Serv.*, 436 U.S. 658 (1978) 16

Cases—Continued:

	Page
NLRB v. *E.D.P. Medical Computer Sys., Inc.*, 6 F.3d 951 (2d Cir. 1993)	4
Nacirema Operating Co. v. *Benefits Review Bd.*, 538 F.2d 73 (3d Cir. 1976)	7
Nathanson v. *NLRB*, 344 U.S. 25 (1952)	4
Nevada v. *United States*, 463 U.S. 110 (1983)	7
Newpark Shipbuilding & Repair, Inc. v. *Roundtree*, 723 F.2d 399 (5th Cir.), cert. denied, 469 U.S. 818 (1984)	12
Ohio v. *Helvering*, 292 U.S. 360 (1934)	16
Oil, Chem. & Atomic Workers Int'l Union v. *OSHRC*, 671 F.2d 643 (D.C. Cir.), cert. denied, 459 U.S. 905 (1982)	7
Perry, In re, 882 F.2d 534 (1st Cir. 1989)	11
Ryan-Walsh Stevedoring Co. v. *Trainer*, 601 F.2d 1306 (5th Cir. 1979)	10
Shepard v. *NLRB*, 459 U.S. 344 (1983)	3-4
United States v. *Nixon*, 418 U.S. 683 (1974)	12
Vaca v. *Sipes*, 386 U.S. 171 (1967)	4
Vermont Yankee Nuclear Power Corp. v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978)	13
Weiss v. *United States*, 114 S. Ct. 752 (1994)	10

Constitution, statutes, regulations and rule:

	Page
U.S. Const. Art. III	2, 3, 4, 6, 12
Administrative Procedure Act, 5 U.S.C. 551 *et seq.*:	
5 U.S.C. 551(2)	17
5 U.S.C. 556(c) (§ 7(c))	18
5 U.S.C. 701(b)(2)	17
5 U.S.C. 702	17
5 U.S.C. 703	18
Black Lung Benefits Act, 30 U.S.C. 932(k)	14, 15
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.*	2, 3
Employee Retirement Income Security Act, 29 U.S.C. 1001 *et seq.*	3
Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*	3

Statutes, regulations and rule—Continued:

	Page
Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*	1
33 U.S.C. 902(1)	15
33 U.S.C. 902(4)	16
33 U.S.C. 902(6)	15
33 U.S.C. 906	2
33 U.S.C. 907(a)	5
33 U.S.C. 907(b)	5
33 U.S.C. 908	2
33 U.S.C. 908(f) (§ 8(f))	17
33 U.S.C. 908(i)	3, 5, 11
33 U.S.C. 909	2
33 U.S.C. 910	2
33 U.S.C. 915(b)	3
33 U.S.C. 916	3
33 U.S.C. 919(d)	17
33 U.S.C. 921(b)(1)	9
33 U.S.C. 921(b)(2)	9
33 U.S.C. 921(b)(3)	10
33 U.S.C. 921(b)(4) (§ 21(b)(4))	13
33 U.S.C. 921(c) (§ 21(c))	6, 7, 13, 15, 16, 17, 18
33 U.S.C. 921(d)	3, 6
33 U.S.C. 921a (§ 21a)	11, 13
33 U.S.C. 939(a)	13
33 U.S.C. 939(c)(1)	3, 5
33 U.S.C. 941	6
33 U.S.C. 944	6
29 U.S.C. 661	10
42 U.S.C. 1983	16
20 C.F.R.:	
Sections 725.410-725.422	14
Section 725.522	15
Section 801.104	10
Sup. Ct. R. 12.3	17

Miscellaneous:

H.R. Rep. No. 1441, 92d Cong., 2d Sess. (1972)	2, 9, 14
S. Rep. No. 1125, 92d Cong., 2d Sess. (1972)	9, 13
S. Rep. No. 209, 95th Cong., 1st Sess. (1977)	14
Sec. Order 38-72, 38 Fed. Reg. 90 (1973)	10

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-1783

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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1. Respondent's contention that the Director, Office of Workers' Compensation Programs, does not have standing to seek judicial review of an erroneous determination by the Benefits Review Board (Board) of a claims award under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* (LHWCA), is premised on a misconception of the matter as a purely private dispute. See Resp. Br. 6-7, 26, 28, 29. It also rests on the erroneous assertion that because the Director is a "neutral" administrator, she cannot "advocate" for either a claimant or an employer without creating an impermissible conflict of interest. *Id.* at 19, 25-28.

Congress created the federal compensation scheme of the LHWCA to further interests broader than merely those

of the particular employer and employee involved in an individual dispute. The program was enacted to "provide adequate income replacement for disabled workers covered" under the LHWCA, "to mee[t] the needs of the injured employee and his family," and also to ensure "that the employer bears the cost of unsafe conditions," thereby "strengthen[ing] the employer's incentive to provide the fullest measure of on-the-job safety." H.R. Rep. No. 1441, 92d Cong., 2d Sess. 1 (1972). Proper determination of award disputes affects the incentive placed by the Act on employers to enhance on-the-job safety; it also affects the extent to which surviving dependents of deceased workers as well as disabled workers themselves will have to seek financial assistance from other public programs—a result Congress specifically intended to avoid. See Pet. Br. 17-18.[1] Cf. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417-418 (1975) (backpay award decisions under Title VII of 1964 Civil Rights Act must "be measured against the purposes which inform Title VII"; "the reasonably certain prospect of a backpay award" provides "the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices"). Accordingly, under the LHWCA, the Director, who is the person charged with administering and enforcing the Act, has Article III standing to seek judicial review of improper awards to vindicate these public interests entrusted to her responsibility—in-

[1] Accordingly, in contrast to the ordinary situation in purely private disputes, the remedy under the LHWCA is carefully circumscribed by the Act's detailed standards for calculating benefits under the LHWCA. The Act specifies what time periods compensation may cover and establishes formulae for determining the amount of compensation (including minimum and maximum amounts) based on a percentage of weekly wages that varies according to such factors as the degree of disability, the part of the body injured, and in cases of death, the number of dependents. See 33 U.S.C. 906, 908, 909, 910.

terests that neither the employer nor the employee may have the same incentive to protect.[2]

As we show in our opening brief, the Director also has legally cognizable interests in the propriety and sufficiency of an award under the LHWCA because of the many specific duties imposed on her by Congress, see Pet. Br. 15-16, 22-25, including her power to bring actions to enforce compensation awards, 33 U.S.C. 921(d).[3] The Director's standing to protect against injury to her duties under the Act, by challenging erroneous decisions on claims for benefits, cannot be distinguished materially under Article III from other statutory schemes in which government officials seek to protect the public interest and obtain relief that also benefits private individuals. See Pet. Br. 18 (discussing government's authority under Title VII of the Civil Rights Act, the Employee Retirement Income Security Act, and the Fair Labor Standards Act); see also *Shepard*

[2] Congress recognized that in some cases employers and employees might prefer to reach a settlement or to arrange their financial relationship in a different manner that might better serve their individual interests but not the public goals, but it significantly restricted their ability to do so. See 33 U.S.C. 908(i) (employer's liability not discharged unless settlement approved by deputy commissioner or ALJ, and settlement may be approved only if adequate and not procured by duress); 33 U.S.C. 915(b) (prohibiting employees from waiving their rights to compenseation under the LHWCA); 33 U.S.C. 916 (providing that "[n]o assignment, release, or commutation of compensation or benefits due or payable" under the Act, except as provided by the Act, shall be valid).

[3] One of the issues raised by the Director in the court of appeals concerned whether the Board erred in resolving as a matter of law the question whether the claimant made diligent efforts to obtain employment in the circumstances of this case, since the claimant reasonably relied on employer statements about a possible position and cooperated with a vocational counselor. How that question is resolved affects the Director's policies on vocational rehabilitation services and her duty to advise employees' regarding their obligations to seek employment during transition periods and vocational rehabilitation. See 33 U.S.C. 939(c)(1); see also Pet. Br. 19.

v. *NLRB*, 459 U.S. 344, 351-352 (1983); *Vaca* v. *Sipes*, 386 U.S. 171, 182-183 (1967); *Nathanson* v. *NLRB*, 344 U.S. 25, 27 (1952) (NLRB is creditor within meaning of Bankruptcy Act of company against whom Board has issued backpay order); *NLRB* v. *E.D.P. Medical Computer Sys., Inc.*, 6 F.3d 951 (2d Cir. 1993) (NLRB acts in public interest when it seeks backpay for workers injured by unfair labor practices).

Respondent and its amici attempt to distinguish those statutes by arguing that Congress in those schemes "specifically conferred standing" on a government official (Amici Br. 13) or set forth a "central governmental enforcement mechanism" (Resp. Br. 34). These, however, are statutory, not constitutional, arguments against standing. If, as we maintain, the LHWCA allows the Director to participate in LHWCA adjudications and their judicial review, then the Director has Article III standing to seek a compensation order that will provide the claimant his rightful benefits, just as government officials have Article III standing under numerous other statutes to vindicate the public interest by obtaining relief that benefits private individuals.

Respondent contends (Br. 25-27, 28) that the Director is a "neutral" administrator. To the extent respondent means that the Director argues in favor of an accurate award under the Act regardless of who stands to benefit from any necessary correction, we agree. To the extent, however, respondent argues that the Director therefore cannot "advocate" for the position advanced by either claimants or employers (Resp. Br. 19, 25-27), we disagree. In any instance where a claimant seeks an accurate, adequate award of the maximum benefits to which he is entitled under the Act, the Director's interests necessarily coincide with those of the claimant. In other instances, when a claimant is seeking an award greater than what he is due under the Act, the Director's interests coincide with the employer's. In either instance, the fact that the employee or employer shares her interest does not mean that

the Director is either biased or no longer protecting the governmental interests conferred by the Act. Cf. *General Tel. Co.* v. *EEOC*, 446 U.S. 318, 326 (1980) (when "EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination").[4] The Director has a material interest in the proper construction and application of the Act, and that interest is engaged each time the Director concludes that the Board has incorrectly adjudicated a particular claim, no matter who stands to benefit from the resolution of the dispute—the affected employee, employer, or insurer.

Respondent also argues (Br. 19, 31-32) that if the Director participates in proceedings where a claim award is being determined, it "may result in the Director taking positions which are in direct conflict with her pecuniary interest in protecting the assets of the Special Fund." Resp. Br. 31. As respondent points out, even in this case, there is a potential to increase the liability of the Special Fund, depending on what degree of disability is

[4] Respondent's assertions that "there is no need for the Director to act as an advocate for claimants" (Br. 29) ignores the fact that by urging an accurate award for the claimant in this case, the Director is espousing her own interests as the official charged with administering and enforcing the Act, which here coincide with those of the claimant. In any event, there is no legal prohibition against the Director's acting as an advocate for or protector of a claimant's interests, inasmuch as Congress determined that in some instances there is a need for her to do so. See, *e.g.*, 33 U.S.C. 939(c)(1) (authorizing Director to provide legal assistance to claimants); 33 U.S.C. 908(i) (authorizing Director to approve settlements only after review to ensure not inadequate and not procured by duress).

Similarly, Congress determined that the Director's interests would sometimes coincide with the employers' interests. See, *e.g.*, 33 U.S.C. 907(b) (Secretary has authority to determine sufficiency of medical care and may on his own, or at request of employer, order a change of physicians or hospitals when desirable, including when the charges (which the employer pays, 33 U.S.C. 907(a)) exceed customary community charges).

determined, what length of time payments are awarded, *ibid.*, and whether respondent becomes insolvent. *Id.* at 32. Respondent reasons that as administrator of the Special Fund, the Director "is obligated to protect its assets," *id.* at 31, and that there is therefore a potential conflict of interest when the Director advocates a position that could increase the financial burden on the Special Fund. *Id.* at 31-32.

Again, respondent misperceives the duties Congress imposed on the Director under the LHWCA. As administrator of the Special Fund, the Director's role is not to resist payment of meritorious claims; to the contrary, her duty is to authorize payment on claims that meet the criteria for Special Fund payment. The fact that an increase of a claimant's award would increase the liability of the Fund does not present a conflict of interest; it is wholly consistent with the duties assigned to the Director under the Act, as long as the award is an accurate determination of what is due the claimant under the Act.[5] Cf.

[5] Respondent concedes that the Director has Article III standing to appeal awards decisions in certain circumstances, *e.g.*, where the award affects the Special Fund or where the decision deals "with her procedural rules for administering Longshore Act claims." See Resp. Br. 28. Respondent also states that the Director "arguably has Article III standing to appeal decisions on the jurisdictional scope of the Longshore Act, since such decisions define her administration." *Ibid.* Likewise, amici acknowledge (Br. 21, 18-19) that the Director "may well incur injury in fact * * * when [] a [Board] order conflicts with her delegated statutory enforcement responsibilities," which amici identify (Br. 19) as: the Secretary's authority to enforce final compensation awards, 33 U.S.C. 921(d); his authority over the Special Fund, 33 U.S.C. 944; and his authority to promulgate and enforce safety rules, 33 U.S.C. 941.

Respondent and amici suggest, however, that the Director does not have statutory standing under 33 U.S.C. 921(c) to protect even those concededly legally cognizable interests against injury because, they assert, the Director is not a "person" within the meaning of 921(c). Resp. Br. 38-39; Amici Br. 19. That contention is contrary to the court of appeals' express holding (Pet. App. 9a, 13a), and, as we show, pp. 15-17, *infra*, is in error.

Nevada v. *United States*, 463 U.S. 110, 127-128 (1983) (noting responsibility of Secretary of the Interior to perform and reconcile competing statutory duties affecting private interests).

2. Respondent and amici repeatedly argue (Resp. Br. 7-9, 25, 28-29, 38; Amici Br. 13-14) that because the purpose underlying the 1972 amendments to the LHWCA was to separate the administrative and adjudicatory functions under the LHWCA, Congress therefore intended to restrict the administrator's right to judicial review. While we agree that a major purpose of the 1972 amendments was to remove the administrator from also serving the role of adjudicator, that rearrangement undermines rather than supports respondent's position that the administrator cannot seek judicial review of the Board's decisions.

A purely adjudicatory entity has no legally cognizable interest in defending its decision on review; hence, a district court does not appear in the court of appeals to defend its decisions. For the same reason, an administrative agency whose role is purely adjudicatory "has no duty or interest in defending its decision on appeal." *Oil, Chem. & Atomic Workers Int'l Union* v. *OSHRC*, 671 F.2d 643, 652 (D.C. Cir.) (per curiam), cert. denied, 459 U.S. 905 (1982). That is one of the reasons courts have declined to accord respondent status to the Benefits Review Board, a purely adjudicatory body, in Section 21(c) review proceedings before the court of appeals. *Nacirema Operating Co.* v. *Benefits Review Bd.*, 538 F.2d 73, 75 (3d Cir. 1976) (Board "performs a review function which prior to the 1972 amendments was performed by the district courts [and like] * * * those courts ha[s] no duty or interest in defending [its] actions on appeal"); *McCord* v. *Benefits Review Bd.*, 514 F.2d 198, 200 (D.C. Cir. 1975) ("[t]o require the Board to appear as a party would parallel requiring the [d]istrict court to appear and defend its [own] decision [on] * * * appeal").

Prior to 1972, the situation under the LHWCA was different. The administrative function was vested in the

same persons as the adjudicatory function—the deputy commissioners. A deputy commissioner was accorded standing to seek court of appeals review of a district court judgment overturning the commissioner's decision on a claim, even in the absence of an appeal by another party. See Pet. Br. 26. (Neither respondent nor amici dispute the deputy commissioners' pre-1972 authority to seek court of appeals review of district court decisions.) This was so because the interest that supported the deputy commissioners' standing to appear before courts and secure judicial review was premised on their policy making, administrative, and enforcement interests, not on their adjudicatory function. When the 1972 amendments separated those functions, the natural inference is that Congress acted on the premise that the administrator, now in the person of the Director, would retain the right to seek federal court of appeals review of claim determinations she believes to be erroneous.

Neither respondent nor amici point to any evidence that the 1972 amendments eliminated the authority of the administrator to seek judicial review. Their argument appears to view any official who participates as a party in an adjudication as exercising some type of "adjudicatory" authority. The adjudicator itself (the Board) is, of course, the only entity serving an adjudicatory function in the proceedings. The participation of the parties (including the Director) does not mean they too are performing an adjudicatory role. Rather, the parties are properly advocating their distinct interests. Respondent claims that Congress "did not intend the administrative function to be involved in the adjudication process." Resp. Br. 8. Yet, the excerpt from the 1972 House Report cited by respondent in support of that proposition merely reveals an intent to keep separate the functions of administering the program and "*sitting in judgment*" at the hearing, *i.e.*, being the adjudicator; it does not indicate an intent to prevent the administrator from participating as a party in the

adjudicatory process. See Resp. Br. 8, quoting H.R. Rep. No. 1441, *supra*, at 11; Amici Br. 6 (same).

In fact, by transferring the administrator's adjudicatory role to ALJs and the Board, the administrator's enforcement role and concomitant interest in securing judicial review of decisions adverse to her position was enhanced, not diminished. The amendments freed the administrator to play a fuller role in the claims process, without interfering with the independent role of the Board. The separation of functions accords the Director greater ability to advocate her administrative interest as a participant in proceedings under the Act. See S. Rep. No. 1125, 92d Cong., 2d Sess. 14 (1972) ("it will be extremely important to have full time able administrators who will not also have to wear the dual hat of being hearing officers for purposes of the disputes brought under this statute").

3. Respondent contends that the Secretary is impermissibly seeking an "advisory opinion" on the correctness of competing interpretations of the Act by seeking, through one of his delgates (the Director), review of the decision of another of his delegates (the Board). See Resp. Br. 22 n.13, 23-25, 29, 36-38, 39. This argument miscomprehends the nature of the Benefits Review Board.

The Board, insofar as it issues decisions on claims, is not a delegate of the Secretary; that *adjudicatory* duty is assigned by statute directly to the Board itself. See 33 U.S.C. 921(b)(2). In arguing to the contrary, respondent mistakenly relies (Br. 37) on 33 U.S.C. 921(b)(1), which permits the Secretary to delegate to the Board's chairman oversight of "all *administrative* functions" necessary to operate the Board. That provision does not concern delegation of adjudicatory functions, which are statutorily lodged in the Board in the first instance.

Congress clearly intended the Board's adjudicatory function to be exercised independently of the administration of the Act, and it entrusted the Secretary with the obligation to ensure that independence. See H.R. Rep. No. 1441, *supra*, at 11; see also *Kalaris* v. *Donovan*, 697

F.2d 376, 390 & 392 n.64 (D.C. Cir.), cert. denied, 462 U.S. 1119 (1983); *Director, OWCP* v. *Eastern Coal Corp.*, 561 F.2d 632, 649 (6th Cir. 1977) (Board is independent of Secretary "as far as policy and decision making are concerned"). The Secretary has therefore accorded the Board complete independence from both the Director and the Secretary in its decisionmaking. See Sec. Order 38-72, 38 Fed. Reg. 90, 91 (1973) (Secretary's order establishing Board directs Under Secretary of Labor to "promulgate such rules and regulations as may be necessary or appropriate for effective operation of the Board as an independent quasi-judicial body in accordance with the provisions of the statute"); see also 20 C.F.R. 801.104. Indeed, courts have held that the Board has the power to declare the Secretary's regulations to be contrary to law. *Gibas* v. *Saginaw Mining Co.*, 748 F.2d 1112, 1119-1120 (6th Cir. 1984), cert. denied, 471 U.S. 1116 (1985); *Carozza* v. *United States Steel Corp.*, 727 F.2d 74, 77 (3d Cir. 1984). The Board does not, however, have authority to engage in administration of the LHWCA by promulgating rules. See *Ryan-Walsh Stevedoring Co.* v. *Trainer*, 601 F.2d 1306, 1314 n.7 (5th Cir. 1979); 33 U.S.C. 921(b)(3).

To be sure, the Board differs somewhat from other fully independent adjudicatory bodies, such as the Occupational Safety and Health Review Commission (OSHRC), see 29 U.S.C. 661, in that the Board is placed within the Department of Labor and the Secretary has the power to appoint and remove members as well as to exercise other operational control over the Board. *Kalaris*, 697 F.2d at 390-391. Cf. *Weiss* v. *United States*, 114 S. Ct. 752 (1994). Nonetheless, the Secretary plays no part in the Board's determination of an award.[6] Thus, although the

[6] Amici err in chastising (Br. 16 & n.12) the Department for "commingling [administrative and adjudicatory] functions" by permitting "the OWCP and the 'quasi-independent' BRB [to] share the same attorneys and legal advice from the Office of the Solicitor of Labor." In fact, the Board employs its own staff of attorneys, who are in the Board's Office of General Counsel, wholly apart from the Office of the Solicitor of Labor. The Office of the Solicitor represents the Board, in conformity with 33 U.S.C. 921a, only in the rare instances when the Board has been the subject of a mandamus action, and it is the Solicitor's policy to assign those cases to attorneys from the Solicitor's Office who do not represent the Director before the Board.

Board is located within the Department of Labor, it, like OSHRC, deviates "from the conventional agency model in that it is purely an adjudicator; there is no intermixing of regulatory, prosecutorial, and adjudicative functions." *In re Perry*, 882 F.2d 534, 537 (1st Cir. 1989); see also *Martin* v. *OSHRC*, 499 U.S. 144, 151 (1991).

The Board's decisions therefore cannot be considered "unitary" agency decisions, as respondent and amici suggest (Resp. Br. 20; Amici Br. 15), because they are not decisions of the Secretary and do not reflect the Secretary's resolution of the claim. In fact, the bifurcated structure of the administrative scheme established by the LHWCA reinforces the fact that the Secretary and the Board may reach differing positions in light of their different roles. The Secretary "enjoys readily identifiable structural advantages" over the Board in certain respects because he participates in informal resolutions of claims, 33 U.S.C. 908(i), and "comes into contact with a much greater number of regulatory problems than does the [Board], which encounters only those regulatory episodes resulting in contested [claims]." *Martin* v. *OSHRC*, 499 U.S. at 152. Thus, the Secretary, through the Director, is free to seek judicial review of Board decisions when, in his view, the Board incorrectly has resolved a claim.

The Director is clearly not seeking an advisory opinion from the court of appeals, as respondent suggests (Br. 22 n.13, 24). If the Secretary were to prevail on the merits in this case, the victory would have a concrete effect: It would result in entry by an OWCP district director of a new compensation order requiring the employer to pay a

higher level of benefits to his injured employee. The Secretary cannot provide such relief; under the terms of the LHWCA, such relief can come only from the court of appeals once a final Board decision has been entered. Cf. *Maine* v. *Taylor*, 477 U.S. 131, 137 (1986) (a State, as intervenor in federal criminal prosecution, has standing to appeal ruling invalidating state law even though federal prosecutor did not seek further review, because controversy remained live inasmuch as reversal of judgment would result in automatic reinstatement of defendant's conviction); *United States* v. *Nixon*, 418 U.S. 683, 692-697 (1974).[7]

4. Although respondent and its amici do not dispute that the Secretary's regulations specifically identify the Director as a party entitled to assert his interest in the administrative process and seek judicial review, they suggest that those regulations conflict with the Act. Amici Br. 5-11; Resp. Br. 24 n.14. The amici go so far as to contend (Br. 8), without any supporting authority, that the Secretary overstepped his authority by authorizing the Director to appear as a "part[y] in interest" in administrative proceedings. That contention has no merit. See *Ingalls Shipbuilding Div.* v. *White*, 681 F.2d 275, 288 (5th Cir. 1982) (upholding Director's party-in-interest status in administrative proceedings), overruled in part on other grounds, *Newpark Shipbuilding & Repair, Inc.* v. *Roundtree*, 723 F.2d 399 (5ht Cir.), cert. denied, 469 U.S. 818 (1984). The Act expressly authorizes the Secretary to issue rules and regulations for purposes of administering the Act, 33 U.S.C. 939(a), and it is a "very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure." *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 544 (1978). That tenet is particularly applicable here, because Congress in 1972 intended "that the Secretary take full advantage of the requirement of separating the functions under this statute to consider a complete reorganization of the * * * administration of th[e] Act" and "to revise the regulations under this Act which ha[d] not been amended for many years." S. Rep. No. 1125, *supra*, at 14.

[7] Respondent errs in suggesting (Br. 7, 20, 22 & n.13, 36-37) that petitioner lacks Article III standing because the sole controversy here is between the Director and the Board, and that the Director's injury is not attributable to respondent. It is respondent that has refused to pay what the Director contends is the appropriate disability benefit for the period in question; thus, there is a controversy between the parties "attributable to the [conduct of the] opposing party (the employer) [as] required for Article III * * * standing." Resp. Br. 20. Compare *INS* v. *Chadha*, 462 U.S. 919, 939-940 (1983).

Amici also argue (Br. 8-9) that 33 U.S.C. 921(b)(4), which permits the Board to remand a case to the ALJ without the consent of "parties in interest," somehow establishes that the Director cannot be a party in interest and therefore precludes her from participating in the administrative process. To the contrary, the most natural reading of that statutory provision is that the Secretary is one of the parties in interest before the Board. The Secretary is expressly accorded the authority to request a remand from the Board in recognition of his special role in protecting the public interest through accurate claim determinations. Indeed, the most natural way for the Secretary to make such a request would be by participating as a party to the administrative proceeding.

The arguments pressed by respondent and amici with regard to the Director's seeking judicial review are unavailing as well. Respondent attempts (Br. 9) to limit the significance of 33 U.S.C. 921a, which allows attorneys appointed by the Secretary to represent him "in any court proceeding[]." Contrary to respondent's contention (Br. 9) that the provision is limited to "enforcement proceeding[s]," the provision by its terms is not so limited, and clearly encompasses Section 21(c) review proceedings in the court of appeals.[8]

[8] The amendment to Section 21a of the Act was described in the legislative history as follows: "Under present law, it is the obliga-

5. Respondent attempts (Br. 35) to downplay the significance of the Black Lung Benefits Act (BLBA), which adopted the pertinent LHWCA procedures. See also Amici Br. 14-15 & n.11. Respondent points out that the BLBA contains a provision that specifies that the Director has party status. 30 U.S.C. 932(k).

We show in our opening brief, however, that the legislative history of the BLBA provision makes clear that at the time Congress enacted that provision, it viewed the Secretary as already having standing under the LHWCA to seek judicial review based on his "interest as the officer charged with the responsibility for carrying forth the intent of Congress with respect to the Act." S. Rep. No. 209, 95th Cong., 1st Sess. 22 (1977). Congress enacted 30 U.S.C. 932(k) to confirm that understanding at the time it brought the BLBA under the same administrative scheme. Neither respondent nor its amici provide sound reasons for rejecting that considered judgment or for treating the black lung scheme differently than the longshore scheme. Both respondent and the amici assert (Resp. Br. 35-36; Amici Br. 15 n.11) that the BLBA is different because in some cases the Black Lung Disability Trust Fund, which the Director administers, is liable on a claim. Many claims under the BLBA, however, do not implicate the Black Lung Disability Trust Fund,[9] and there is no indication

tion of the United States attorney in the district where a case is pending to represent the Secretary or deputy commissioner in cases under the Act. Under the amendment made by this section, attorneys will be appointed by the Secretary to represent the Secretary, the deputy commissioner, a hearing officer, or the Board, except in proceedings in the Supreme Court." H.R. Rep. No. 1441, *supra*, at 21-22.

[9] Respondent states (Br. 36) that in the majority of black lung claims the Black Lung Disability Trust Fund is primarily liable for the claim. This is an overstatement. The Director estimates, for example, that of claims decided during fiscal year 1994 at the district director level, see 20 C.F.R. 725.410-725.422, no more than 30% are claims in which the Director arguably has a financial interest, *i.e.*, are claims in which the Trust Fund is primarily liable or are claims on which, although a responsible operator has been identified, the Trust Fund is paying interim benefits, pending final resolution, based on the district director's initial finding of entitlement. See 20 C.F.R. 725.522.

that 30 U.S.C. 932(k) was intended to apply only to cases implicating the Fund. Indeed, the legislative history of the provision makes clear that a financial stake is not a prerequisite to the Director's standing, and the Director's standing has been upheld under the Act even in the absence of a pecuniary interest. *Director, OWCP* v. *Rochester & Pittsburgh Coal Co.*, 678 F.2d 17, 18 n.2 (3d Cir. 1982). Denying the Director standing under the LHWCA, or limiting her standing to cases in which she has a financial interest, would create unwarranted divergence between LHWCA and BLBA procedures, whereas Congress intended that the procedures for administrative and judicial review under the statutes be the same.

6. Finally, respondent and amici argue (Resp. Br. 20, 23, 38-39; Amici Br. 3, 11-13) that the Director does not have statutory standing under 33 U.S.C. 921(c) as a "person adversely affected or aggrieved," because she is not a "person" within the meaning of the LHWCA. Their argument appears to be that because the statutory definition of "person" (33 U.S.C. 902(1)) does not in terms include "Secretary," and because there also is a statutory definition of "Secretary" (33 U.S.C. 902(6)), the Secretary is necessarily excluded from being considered a person under the Act.

That argument is illogical and inconsistent with the structure of the Act. "Person" is defined for purposes of the Act as an "individual, partnership, corporation, or association." 33 U.S.C. 902(1). "Secretary" is defined to be the Secretary of Labor. 33 U.S.C. 902(6). The mere fact that there is a separate definition to explain who

is referred to by the term "Secretary" does not mean that the Secretary is not an "individual" for purposes of the definition of "person." In fact, if respondent's logic were correct, employers would not have standing under 33 U.S.C. 921(c), because "Employer" is defined separately in 33 U.S.C. 902(4) and the definition of "person" does not specifically include "employer."

It is clear that the Director is an "individual," and hence a "person" entitled to obtain review under 33 U.S.C. 921(c). The term "person" may encompass a governmental official, such as the Director, where the context of the statute so indicates. See generally *Ohio* v. *Helvering*, 292 U.S. 360, 370 (1934) (whether term "person" includes a State or United States depends upon the legislative context in which the word is found); see also *International Primate Protection League* v. *Administrators of Tulane Educ. Fund*, 500 U.S. 72, 83 (1991) ("conventional reading of 'person' [as excluding the sovereign] may * * * be disregarded if '[t]he purpose, the subject matter, the context, the legislative history, [or] the executive interpretation of the statute * * * indicate an intent, by the use of the term, to bring state or nation within the scope of the law' "); *Monell* v. *Department of Social Serv.*, 436 U.S. 658 (1978) (municipal officials are persons under 42 U.S.C. 1983); *Far East Conference* v. *United States*, 342 U.S. 570, 576 (1952) (United States is "person" who may file a complaint under Shipping Act of 1916). The LHWCA's structure and history compel the conclusion that the Director is a "person." Indeed, were this not so, the Director would be powerless to seek review of *any* Board decision, a result that would be inconsistent with the holding of the court below and of every court of appeals that has addressed the question of the Director's standing.

The court of appeals expressly held that the Director is a "person adversely affected or aggrieved" by the Board's ruling on whether respondent was entitled to relief from

the Special Fund under Section 8(f) of the Act, 33 U.S.C. 908(f), and reversed the Board's ruling on that issue. See Pet. App. 9a, 13a (Director is "person * * * aggrieved" by a Board ruling that the Special Fund is liable under Section 8(f)). Thus, contrary to respondent's assertion (Br. 39) that the court of appeals "did not * * * have to reach the issue," the court of appeals' holding necessarily includes a determination that the Director is a "person" within the meaning of the Act—a holding that respondent did not challenge by filing a cross-petition for certiorari under this Court's Rule 12.3.

Moreover, no court has suggested that the Director is without any authority to seek review under 33 U.S.C. 921(c), which would be the necessary consequence of holding that the Director is not a "person" under the Act. Every court that has addressed the issue in the context of a Section 8(f) dispute has accorded the Director standing to seek judicial review. See, *e.g.*, *Director, OWCP* v. *Cargill, Inc.*, 718 F.2d 886, 888 (9th Cir. 1983); *Director, OWCP* v. *Newport News Shipbuilding & Dry Dock Co.*, 676 F.2d 110, 114 (4th Cir. 1982); *Director, OWCP* v. *National Van Lines, Inc.*, 613 F.2d 972, 977 n.6 (D.C. Cir. 1979), cert. denied, 448 U.S 907 (1980); see also *Director, OWCP* v. *General Dynamics Corp.*, 982 F.2d 790 (2d Cir. 1992) (petition for review granted).

Amici (Br. 16-17; 21-22) err in suggesting that the Director's statutory standing is precluded by the Administrative Procedure Act (APA), which, unlike the LHWCA, expressly excludes federal agencies from those "persons" that it authorizes to obtain judicial review of agency action. See 5 U.S.C. 702, 701(b)(2), 551(2). That provision is not applicable to judicial review proceedings under the LHWCA [10] because, according to the APA itself, "[t]he

[10] As we note in our opening brief, the LHWCA specifies that hearings before ALJs shall be conducted in accordance with APA procedures. See 33 U.S.C. 919(d). Although amici cite (Br. 17 n.13) *Director, OWCP* v. *Greenwich Collieries*, 114 S. Ct. 2251

form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute." 5 U.S.C. 703. In the case of Benefits Review Board decisions under the LHWCA, that special statutory review proceeding is the proceeding authorized by Section 21(c) of the LHWCA, 33 U.S.C. 921(c), which must be interpreted according to its own terms and the structure and purposes of the LHWCA as a whole.

For the foregoing reasons and those stated in petitioner's opening brief, the judgment of the court of appeals should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

THOMAS S. WILLIAMSON, JR.
Solicitor of Labor

DECEMBER 1994

(1994), that decision is inapposite. The Court there held that Section 7(c) of the APA, 5 U.S.C. 556(c), placing the burden of proof on a proponent of an order, governs in ALJ hearings because the LHWCA does not indicate that a contrary rule applies.

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